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# THE RATIO DECIDENDI OF A CASE

PROFESSOR MONTROSE and Mr. Simpson have now on four occasions expressed views concerning the *ratio decidendi* of a case.[1] I would have hesitated to intervene in this gladiatorial combat if it had not been for the fact that both of them referred at considerable length to my article "Determining the *Ratio Decidendi* of a Case."[2] It is not my purpose to discuss in the present article the points on which they seem to disagree because I am not certain that I have always understood their arguments. I am concerned with a narrower and more personal matter. Both of the learned writers are in agreement that the conclusions reached in my article are unsatisfactory. Professor Montrose does so on the ground that they conflict with the "classical" theory which he accepts as being correct, while Mr. Simpson is of the opinion that my theory is substantially the same as the "classical" one which he regards as open to criticism.

The learned writers are not in accord concerning either the existence or the nature of the "classical" theory, but they are in happy agreement concerning the content of my doctrine relating to the binding precedent. Unfortunately, from my standpoint, they both state my theory in a form which I find it impossible to recognise, as it omits what I regard as the essential point of my thesis. For some reason, which I find it difficult to understand, both the learned writers, instead of referring to my article directly, are content to quote a single sentence, taken out of its context, from Dr. Glanville Williams' valuable book *Learning the Law*. Thus in his first article[3] Professor Montrose says that "Glanville Williams accurately summarises Goodhart's thesis in the following sentence:

[1] J. L. Montrose, "*Ratio Decidendi* and the House of Lords" (1957) 20 M.L.R. 124; A. W. B. Simpson, "The *Ratio Decidendi* of a Case" (1957) 20 M.L.R. 413; J. L. Montrose, "The *Ratio Decidendi* of a Case" (1957) 20 M.L.R. 587; A. W. B. Simpson, "The *Ratio Decidendi* of a Case" (1958) 21 M.L.R. 155.
[2] *Essays in Jurisprudence and the Common Law*, pp. 1–26 (1931).
[3] p. 125.

'The *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon': *Learning the Law*, 3rd ed., 1950, p. 57." This single sentence is also accepted by Mr. Simpson as a correct statement of my view. As I do not agree that, taken by itself, this gives an accurate summary of my thesis, it may perhaps clarify matters if I state as briefly as possible what I did say in my article.

I began by pointing out that although nearly all the books on jurisprudence, from the time of Austin onward, had stated that it was necessary to distinguish between the general principle of a case, which constitutes the *ratio decidendi*, and the concrete decision, few attempts have been made to state any rules by which these general principles can be determined. The phrase "*ratio decidendi*" is misleading because the reason which the judge gives for his decision is not binding and may not correctly represent the principle. I cited a large number of cases in which the reasons given for the decisions were obviously wrong or were based on a misunderstanding of legal history, but nevertheless the principles established by these cases were valid and binding.[4] Moreover, there were numerous cases in which no reasons were given, but this did not affect their authority as a precedent. *Oliver* v. *Saddler and Co.*[5] is a modern illustration of this. Secondly,[6] it is not the rule of law *set forth* by the court, or the rule *enunciated*, as Halsbury puts it, which necessarily constitutes the principle of the case. Here again, there may be no rule of law pronounced in the judgment, or the rule when stated may be too wide or too narrow. In the appellate courts the various judges may set forth different rules of law, but nevertheless each of these cases must contain a principle which is binding in future cases. Thirdly,[7] the *ratio* cannot be found in the facts of the case together with the decision reached on those facts. At the time when I wrote my article there was an influential American school of thought which held that "Not the judges' opinions, but which way they decide cases, will be the dominant subject-matter of any truly scientific study of law."[8] This is an attractive theory because under it, as I said,[9] "We can ignore the *vocal behaviour* of the judge, which sometimes fills many pages, and concentrate upon his *non-vocal* behaviour, which occupies but a few lines." I pointed out that, unfortunately, this theory is based on the fallacy that the facts of a case are a constant factor, and that the judge's conclusion is based upon the fixed premise of a given set of facts. The crucial question, however, always is "What facts are we talking about?"

[4] pp. 2–4.
[5] [1929] A.C. 584.
[6] pp. 5–8.
[7] pp. 9–10.
[8] Professor Oliphant, "A Return to *Stare Decisis*," *American Bar Association Journal* (1927, Vol. XIV, p. 71).
[9] p. 9.

Having rejected these three methods of establishing the *ratio decidendi*, I suggested that the principle of the case could be found by determining (a) the facts treated by the judge as material, and (b) his decision as based on them. I stated this as follows [10]: "The judge, therefore, reaches a conclusion upon the facts *as he sees them*. It is on these facts that he bases his judgment, and not on any others. It follows that our task in analysing a case is not to state the facts and the conclusion, but to state the material facts as seen by the judge and his conclusion based on them. *It is by his choice of the material facts that the judge creates law.*" I was careful to italicise the words I considered to be of particular importance. I then suggested various rules which would be of help in determining these material facts. Of these the most important is the rule that [11] "the reasons given by the judge in his opinion, or his statement of the rule of law which he is following, are of peculiar importance, for they may furnish us with a guide for determining which facts he considered material and which immaterial."

Finally [12] I suggested that if in an appellate case there are several opinions which agree as to the result but differ as to the material facts, then the principle of the case is limited so as to fit the sum of the facts held material by the various judges, or by the majority of them. This summary of my theory must make it clear that I placed all my emphasis on the material facts as seen by the judge, and not on the material facts as seen by anyone else. With this explanation as an introduction we can now turn to the debate between Professor Montrose and Mr. Simpson.

In his first article Professor Montrose, after pointing out that in my theory the *ratio decidendi* of a case is not to be found in the rule of law stated by the judge, holds that this is in conflict with the "classical" view which regards the *ratio* as "the principle of law propounded by the judge as the basis of his decision." He then says [13]:

> "The 'classical view' may be regarded as true even though the principle stated by the judge is subsequently held to be too broadly expressed as a binding rule of law. There is abundant authority for reading a judgment *secundum subjectum materiam*. The important question is whether the proposition propounded by the judge may, so far as its binding character is concerned, be entirely ignored. That it can be so rejected is, *pace* Paton, the thesis of Goodhart."

With great respect, this statement of my thesis is, as I have already pointed out, based on a misconception. My view is that the principle stated by the judge may not by itself state the binding rule of law, but I made it abundantly clear that it cannot be "entirely

[10] p. 10.
[11] p. 18.
[12] p. 26.
[13] p. 125, n. 6.

ignored " because it may constitute an essential step in determining what are the material facts as seen by the judge. A striking illustration of my thesis can be found in *Donoghue* v. *Stevenson*.[14] Lord Atkin stated the broad principle of law as follows[15]: " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." This statement of the general principle cannot in my view be accepted as a binding rule of law, as has been shown in a number of subsequent cases where it has not been applied.[16] On the other hand, it cannot be ignored, for it is of the greatest importance in furnishing a key to the determination of the material facts as stated thereafter by Lord Atkin.[17] It is in this statement of the material facts and the conclusion based on them that the *ratio decidendi* of the case can be found.

Mr. Simpson begins his note[18] by stating that the Goodhart theory " . . . is said by Professor Montrose to be accurately summed up by the proposition that the *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon." Perhaps some confusion might have been avoided if Mr. Simpson, instead of relying on Professor Montrose's interpretation of Dr. Glanville Williams' brief summary of my thesis, had referred to the thesis itself. Mr. Simpson, as I understand it, argues that where the judge does explicity state a principle of law, this constitutes the *ratio decidendi* under the classical theory, and that my theory is indistinguishable from it. I must confess that I have found some difficulty in following the argument by which this conclusion is reached. He says that[19] " a rule of law will always be found to contain two parts; the first specifies a number of facts and the second specifies the legal result or conclusion which ought to follow whenever these facts are found to co-exist." I assume that this means that Lord Atkin's statement concerning the duty of care to one's neighbour can be translated to read, " The defendant has failed to take reasonable care to avoid injuring the plaintiff in a foreseeable manner. He must therefore pay damages for the injury he has caused." Mr. Simpson then continues:

> " When, therefore, a judge states a rule of law, and treats it as applicable to the case before him, the applicability must

[14] [1932] A.C. 562.

[15] p. 580.

[16] See cases cited in Salmond on *Torts*, 12th ed., § 121.

[17] Lord Atkin said at p. 599: " If your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

[18] p. 413.

[19] p. 414.

> depend upon his finding that the *material* facts of that case correspond precisely to the facts specified in that rule, and, this being so, that the conclusion or result specified in that rule ought to follow."

It is here that I find great difficulty in following the argument, because, although it is true that the judge's statement of law must be assumed to relate to the material facts of the case, it does not follow from this that it corresponds precisely to them. For one thing, it may be far wider than the material facts themselves.

Mr. Simpson continues by saying [20]:

> "It seems therefore that Professor Goodhart, having said that the proposition of law propounded by the judge may be ignored in determining the *ratio decidendi*, and having advanced weighty arguments tending to show that such propositions make unsatisfactory *rationes decidendi*, fails to see that his own arguments make it obligatory that such a proposition should not be ignored. His own theory is just as much open to the same criticism as he and others have directed against the classical theory—criticism to which there has been as yet no satisfactory reply."

I am not certain which theory Mr. Simpson considers to be "the classical theory," but I assume that he is referring to the one which regards the statement of law to be the binding principle of the case. I do not know who the "others" are who have criticised this theory, but my criticisms were (a) that every case must contain an ascertainable principle of law, even though there may be no opinion delivered by the judge. This point is ignored by the "statement" theory. (b) That the statement of law may be too wide or too narrow. Neither of these criticisms is applicable to my theory, based as it is on the material facts of the case as seen by the judge, however subject it may be to other possible criticisms not referred to by Mr. Simpson.

In his second article Professor Montrose begins [21] by pointing out again that he accepts as accurate Dr. Glanville Williams' summary of my theory, but he fails to mention that this single sentence is part of a whole chapter in which it is made clear that the material facts are those seen by the judge. He then adds to the difficulty of the problem by stating [22] that "the terminology whereby '*ratio decidendi*' signifies the rule propounded by the judges should not be allowed to be used to beg the question whether such a rule is of binding authority." If this is the sense in which *ratio decidendi* is used by Professor Montrose, then the whole discussion seems to be meaningless, because when other writers discuss the question whether the rule of law stated by the judges constitutes the *ratio decidendi* of a case they are discussing whether or not this

[20] p. 415.
[21] p. 587, n. 5.
[22] p. 588.

statement is of binding authority in future cases. If *ratio decidendi* means nothing more than the rule propounded by the judges, then it is a singularly unhelpful and unnecessary phrase. The point at issue is whether these rules, thus propounded, are to be regarded as binding, *i.e.*, do they constitute the *ratio decidendi* of the case?

Professor Montrose then says [23]:

> "It is convenient here to indicate the nature of my agreement with Simpson in his criticism of Goodhart. Goodhart's article asserts in the first part that the judge's actual reasoning may be ignored in determining what is the rule of law established by the case. In the second part, however, he asserts that the later judge must take into account the precedent judge's statement of what facts are to be considered material. But the judge's statement of what facts are to be considered material is part of his actual reasoning. Where a judge does not explicitly pronounce the rule upon which he bases his decision, but explicitly says what facts he considers material, then we may have an implicit *ratio decidendi* which, according to Goodhart's second part, must be followed, though from the first part of his article one is led to believe that he does not consider any *ratio decidendi* as binding."

There is no conflict between the first part of my article and the second part. When Professor Montrose says that "from the first part of his article one is led to believe that he does not consider any *ratio decidendi* as binding" it is obvious that he must be using the phrase in a novel sense which I find it difficult to understand. My whole article would be meaningless if I did not consider any *ratio decidendi* to be binding. The whole point of my article was based on the proposition that every case must contain a binding principle, but that this binding principle is not necessarily to be found in the statement of the law made by the judge.

On the other hand, I am in agreement with Professor Montrose in rejecting Mr. Simpson's view that the "classical" theory is not distinguishable from mine. He points out that Mr. Simpson's thesis is based on the argument [24] "that when a judge pronounces a rule of law as the basis of his decision, he enunciates the material facts of the case. Since this is not true, it follows that there is a distinction between the rule of law which a judge may happen to propound, and a rule constructed from the material facts of the case and the decision on them, though, of course, in some cases the pronouncement may coincide with the construction."

In his reply, Mr. Simpson, after pointing out [25] that Professor Montrose defines the phrase *ratio decidendi* in an unusual way, discusses the question whether there is a distinction between the classical and the English theory of precedent, and what Professor

[23] p. 592.
[24] p. 593.
[25] p. 155.

Stone thought of this in his book *The Province and Function of Law*. As I am doubtful whether it can be said with any truth that there is a definite classical theory or a precise English theory as so little has been written on this subject in the past, I am not certain that this discussion is of much value. It is of interest, however, to note that the learned writers seem to have reconstructed Stone's views almost as thoroughly as they have done mine. Thus Mr. Simpson says [26]:

> "On p. 593 (1957) 20 M.L.R. I see that according to Professor Montrose, Stone [27] pointed out that the Goodhart theory is one which says 'that the rule of law for which a case is of binding authority *is not one which is pronounced, explicitly* or implicity, *by the judge in the precedent case*, but which is constructed by later judges.' [28] I find this hard to reconcile with his statement a few lines further up that Stone 'nowhere refers' to the classical theory."

I am not concerned with the question whether Stone did or did not refer to the classical theory, but I cannot find in Stone's book the statement that according to my theory the rule of law for which a case is of binding authority is constructed by later judges. It would be surprising if he had said so, because it is in direct conflict with my view that the principle is based on the material facts, determined expressly or implicitly, by the judge or judges in the precedent case. It certainly does not follow from this that the principle of the precedent case "is constructed by later judges" whose function it is to interpret and not to construct. Similarly, judges must interpret statutes, but it would be misleading to say that they are therefore constructing them. To take a non-legal analogy, a critic who interprets a poem cannot be described as constructing it although other critics may disagree with his interpretation, just as judges in subsequent cases may disagree concerning the rule of law established by the precedent one.

As so many references are made to Stone in these articles it may clarify the discussion if I point out the actual grounds on which he criticised my "ingenious view." He does so in a note,[29] because "since even its learned author could not claim that his rules describe the actual uniform operation of English courts a full consideration is not here called for." As there is no actual *uniform* operation of English courts concerning the application of precedents it would seem to follow that all theories on this point, including those expressed by Professor Stone, must be invalid. I did not purport to establish any fixed rules which must be followed by the courts, for any such attempt would be as pointless as it would be egotistical. I was merely trying to give a guide to the method

[26] p. 159, n. 21.
[27] *Op. cit.*, p. 187.
[28] My italics.
[29] p. 187, n. 219.

which I believe most English courts follow when attempting to determine the *ratio decidendi* of a doubtful case.

Stone then says: "Further his rules for determining the 'material' facts are artificial and, in part indeterminate, requiring guesses as to what facts the courts tacitly took as material. They would thus leave the *ratio* in many, if not in most, appellate cases a matter for variable judgment even if they were accepted." If it were possible to devise a method by which all precedents would become determinate, then the difficulties of interpretation would disappear, but I believe that this is a vain hope. It is not a valid criticism of a system, therefore, to say that some precedents will always remain indeterminate. This is due to the subject-matter itself, and not to the system which is applied to it. Guesswork must always play a part in legal interpretation: this is what makes the law so interesting.

I am not certain what is covered by Professor Stone's sentence which reads: "Reasons given and propositions of law formulated in further decisions are, for instance, no less influential, even if they are no more conclusive than the facts." If this means that further decisions are frequently required before the scope of a principle is finally determined, then I am in complete agreement with it, but this does not mean that each case ought not to be analysed as precisely as possible. When we take one step we may not be certain how far this will ultimately lead us, but it is useful to know in what direction we are headed. Paton's metaphor is a sound one [30]: "One case, so to speak, plots a point on the graph of tort, but to draw the curve of the law we need a series of points."

Perhaps I may finally point out that the present debate illustrates my thesis concerning the essential importance of establishing the material facts on which a conclusion may be based, because much of the confusion in these articles could have been avoided if there had been more precision in the various references. These may be described as the material facts under discussion.

A. L. GOODHART.*

[30] Paton, *A Text-Book of Jurisprudence* (1951), 2nd ed., p. 161.

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# TRIBUNALS AND INQUIRIES

"But what good came of it at last?"
Quoth little Peterkin.
"Why that I cannot tell," said he,
"But 'twas a famous victory."

Opposing armies in perpetual array, campfire talks where the older warriors retell their exploits in the last battle so many years before, daily reconnaissance at stated hours known to both sides and left unchallenged, sorties and skirmishes with dummy ammunition, rules for mutual convenience agreed and adhered to, fraternising games at Christmas, no wounds except those self-inflicted, cardboard guns, pouches filled with chocolate creams—and suddenly, a shot fired in anger, a roll of drums, tents being struck, battalions on the move, the real thing at last, the noise and the people, hand to hand, issues in doubt, reserves thrown in, decisive engagements; then the aftermath, the counting of the dead, the re-forming of the units, and again opposing armies in perpetual array, more and better campfire talks. . . .

So it seems to have been with the cycle of 1928–32, Hewart and the Donoughmore Committee; repeated in 1954–58, Commander Marten lighting the fuse to his own barrel, which duly exploded and set off another which was not his, the Franks Committee, the Tribunals and Inquiries Act, and Circular nine oblique fifty-eight.

Was it a necessary war? Was it even a just war? Was it a famous victory? And if so, who won?

The Committee on Administrative Tribunals and Enquiries (Chairman: Sir Oliver Franks) was appointed on November 1, 1955, "to consider and make recommendations on: (a) The constitution and working of tribunals other than ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions. (b) The working of such administrative procedures as include the holding of an enquiry or hearing by or on behalf of a Minister on an appeal or as the result of objections or representations, and in particular the procedure for the compulsory purchase of land." The Committee reported on July 15, 1957.[1] The House of Commons debated the Report on October 31, 1957, and the House of Lords on November 27, 1957.[2] A Government measure, the Tribunals and Inquiries Bill, which made statutory provision for some of the Committee's recommendations, was introduced into

[1] Cmnd. 218.
[2] 575 H.C.Deb. 400–519; 206 H.L.Deb. 522–592.

the House of Lords where it received its Second Reading on April 1, 1958, passed through Committee on April 22 and 29, was reported on May 13 and received its Third Reading on May 20.[3] The Bill received its Second Reading in the House of Commons on July 3, 1958, was reported and received its Third Reading on July 25, 1958, with amendments which were agreed to by the House of Lords on July 28, 1958.[4] The Bill received the Royal Assent on August 1, 1958. As will be seen, many other recommendations of the Committee were in principle adopted by the Government and put into effect by administrative devices such as circulars and by changes of practice.

The Franks Report began by making some rather formal passes through the air without striking anything except poses—a little unreal though not altogether lacking in charm, as if the drafters thought there was a lot of stuff always said at this point, to be got out of the way and set down. I mean passages like the need "to seek a new balance between private right and public advantage, between fair play for the individual and efficiency of administration," "the procedures by which the rights of individual citizens can be harmonised with wider public interests," "finding a right relationship between authority and the individual" (which, we are told, is a problem "not confined to this country" and has "become a matter of concern on both sides of the Atlantic"), "the balance between the public interest which Administration promotes and the private interest which it disturbs," "government rests fundamentally upon the consent of the governed," and so on,[5] in terms which look as though they were indicating the ideal solution (the "balance," "fair play," "harmonised," "right relationship") when in fact they are restating the problem or relying on comforting, meaningless and apparently indestructible constitutional fictions. Ministers of the Crown can do this turn better than most. The Home Secretary slipped in Magna Carta, the Bill of Rights, de Tocqueville and Blackstone, on moving the Second Reading of the Tribunals and Inquiries Bill. In half a column, he managed to speak of the tilting of the scales in favour of the State, of restoring the balance, of the arbitrary exercise of the growing powers of the State, of striking a just balance and of restoring to the individual citizen the protection to which he has always been and must always be entitled.[6] The Attorney-General perhaps found breathing a little difficult at those heights, so he started his reply to the debate by saying how much better the Conservative "Rule of Law" pamphlet was than the Socialist "Personal Freedom" pamphlet, cocked a snook at Sir Hartley

[3] 208 H.L.Deb. 584–622, 852–908, 1088–1118; 209 H.L.Deb. 274–298, 471.
[4] 590 H.C.Deb. 1609–1693; 592 H.C.Deb. 825–841; 211 H.L.Deb. 326.
[5] Cmnd. 218, paras. 5, 6, 21, 22.
[6] 590 H.C.Deb. 1609–21.

Shawcross, answered some of the points made, and sat down without a peroration about power, balances or scales at all.[7]

The same sort of criticism—or, at least, doubt—applies to the Committee's "general and closely linked characteristics" which, they felt, should mark the special procedures they had to consider: the characteristics of openness, fairness and impartiality. Now this sounds well, even if it smacks a little of Calvin Coolidge's preacher who was against sin. The Committee somewhat ponderously declares that if the procedures were wholly secret, the basis of confidence and acceptability would be lacking; that if the objector were not allowed to state his case, there would be nothing to stop oppression; and how, ask the Committee, can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds?[8] All this advances the matter but little further. For the procedures within the Committee's terms were precisely those, and only those, for which Governments had provided a special statutory procedure in order, in the great majority of cases, to give expression to these characteristics. The Committee could have argued that since there is a right to a hearing before a man can be compelled to part with his property, so there ought to be a right to a hearing before an alien could be compelled to leave the country. Then their argument for openness, fairness and impartiality would have had much force. Or if they had observed that since openness, fairness and impartiality were required before a man was denied industrial injury benefit, surely Commander Marten was entitled to like consideration; then again the point would have been well worth making. There is the open side of administration and the closed side. The Committee was asked to consider only the open side. Minor improvements can there be made, many of which the Committee recommended. The main weakness of the whole inquiry, not that the Committee was remotely responsible for this, was that it was directed in exactly the wrong direction. The Committee was told, in short, to look at procedures which were predominantly open, fair and impartial and asked to see if they could be made any more so. And the Committee answered that they could in a few small ways. But into the closed, dark and windowless procedures the Committee was not asked to let air and light.

## Tribunals

The crux of the attitude of the Committee to administrative tribunals is to be found in paragraph 40 of the Report, which, since it has been so often quoted, in and out of Parliament, should be put down in full:

[7] *Ibid.* 1684–93.
[8] Cmnd. 218, para. 24.

"Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence, including that of the Joint Permanent Secretary to the Treasury, appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. Thus, for example, tribunals in the social service field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned, either at first instance (for example in the case of Rent Tribunals and the Licensing Authorities for Public Service and Goods Vehicles) or on appeal from a decision of a Minister or of an official in a special statutory position (for example, a valuation officer or an insurance officer). Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term 'tribunal' in legislation undoubtedly bears this connotation, and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable."

This paragraph is riddled with confusion. There is first the false distinction, however respectable in constitutional fiction, between the view of the "Government" and the intention of "Parliament." It may be a convenient form of shorthand to speak of a piece of Governmental policy enshrined in a statute as an expression of Parliamentary intention, though even that is dangerous because we can too easily slip into the dangerous fallacy of seeming to say that the legislature is an expression of the joint will of Commons and Lords instead of the expression of the will of the Queen in Parliament, which, if she will pardon the expression, is a very different dog. But when, as here, a contrast is being drawn between the Governmental view and the intention of Parliament on the purpose of a statutory provision, the shorthand is wholly misleading. Tribunals are *not* "machinery provided by Parliament." Parliament has *not* "deliberately provided for a decision outside and independent of the Department concerned." It is *not* true that the use of the term "tribunal" indicates that Parliament meant to provide for the independence of decision. It is the Government, the Department, which made all these rules. If we are trying to discover the real purpose for the establishment of tribunals and how far they were meant to be separate from the Departments, then it is the "official" view of the Joint Permanent Secretary to the Treasury which is more likely to be historically accurate.[9] This

[9] For his Evidence, see Minutes of Evidence, Day 24, paras. 5711–33.

is not to suggest that the Committee was obliged to accept that view. But it would have been clearer to say " We think tribunals should be more independent " than to argue some theoretic notion of Parliamentary intention.

Again, to say " We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration " advances the real issue no further. The dichotomy is false. There is no reason why the machinery for adjudication should not be part of the machinery for administration. Indeed in one sense it must be precisely that, however independent the tribunals are.

But above all, the argument that tribunals were created primarily to ensure that decisions should be made independently of the Departments is not valid. The real advantages of tribunals and the usual reasons for their establishment are well known to be their cheapness, their informality, their expertness and the speed with which decisions can be obtained. Take some examples. Rent tribunals were set up because it was thought that the county court would have few of those advantages and because Mr. Bevan did not think it was necessary to have lawyers to decide questions of fact. Industrial injury disputes were in the hands of the courts. To say that they were taken out of those hands and given to an administrative tribunal in order to keep them away from the Department seems odd. Why not leave them where they were? It could still be argued that once the decision had been taken not to give the county court the power to fix reasonable rents and to take away jurisdiction in industrial injuries from the ordinary courts, then these decisions were entrusted to bodies separate from the Departments to ensure independence. But even this will not hold. Even if we accept that Departmental decisions would be as cheap, informal, expert and speedy (and there must be doubt about the speed at least), the truth was that the Departments did not want to be bothered with these decisions. And this for the most obvious of reasons: that the Departments did not mind what the decisions were, for no questions of policy were involved. Whether 12s. or 15s. is a reasonable rent for two rooms in Islington; whether Mrs. Smith is entitled to a widow's pension; whether Mr. Smith was injured by an accident arising out of and in the course of his employment—these decisions did not *matter* to the Department. They were not like decisions on compulsory purchase orders or planning appeals or clearance orders, where the individual decisions shaped and reflected the policy. In most cases, the Departments made the regulations or put them in the Acts, and the scope of individual decisions was strictly limited. Rent tribunals were exceptional but here the sheer size of the problem, the inevitability of decentralisation, and the inappropriateness of employing local authorities were overwhelming reasons for keeping the administration out of the Departments. When policy questions looked as if

they might arise—as in classifications under the National Insurance scheme—then the decision was kept in the Department.

All this is very far from the assertion that Parliament in " clear and unmistakable " terms provided for tribunals in order to ensure that their decisions should be independent of the Departments. The assumption still persists, despite the Donoughmore Committee, that Departments are avid for power; that they wish to have everything in their hands, principle and detail, policy and administration alike. In practice, Departments are not so shortsighted. They may want the substance of power, the making of vital decisions, but they are frequently anxious to avoid responsibility for the application of principle and policy and happily use local authorities for this purpose—or administrative tribunals. Of course, Departments often try to have the best of both worlds and cannot always keep their hands off local authorities, especially when the latter are spending Government money. But with what relief do Ministers and Departments and Members of Parliament reply, to complaints about the allocation of council houses or the working of grammar school selection or the decisions of national insurance officers upheld on appeal, that this is something for which they are not responsible as " Parliament "—that so convenient abstraction—has vested the power and responsibility elsewhere.

The desire to make tribunals more independent of the Departments is traceable in many of the Committee's more important recommendations, such as the establishment of two standing Councils to review the constitution and working of tribunals continuously and to be appointed by and to report to the Lord Chancellor [10]; the appointment of chairmen by the Lord Chancellor [11]; the appointment of members by the Councils [12]; and appeals not to lie, as a general principle, from tribunal to Minister.[13]

The Act does not go the whole way with these recommendations. It establishes one Council only. This has power " to keep under review the constitution and working " of tribunals and to report; to consider and report on any particular matters referred to it with respect to tribunals. It has a Scottish Committee which consists of some Council members and some others. Reports by the Council, and references to it, are made by the Lord Chancellor and the Secretary of State for Scotland. The Council is to make an annual report which will be laid before Parliament.[14] How this body works, what attitudes it adopts, what use it has, will depend on its members. The chairman is Lord Reading, aged 70, Rugby and Balliol, and most recently (1953–57) Minister of State for Foreign Affairs. The other members are: The Hon. R. E. B.

[10] Cmnd. 218, para. 43.
[11] Para. 48.
[12] Para. 49.
[13] Para. 105.
[14] Tribunals and Inquiries Act, 1958 (6 & 7 Eliz. 2, c. 66), ss. 1, 2.

Beaumont, T.D., aged 58, Eton and Christ Church, Conservative M.P. 1931–45, and amongst other things chairman of Montgomeryshire County Agricultural Executive Committee; D. B. Bogle, Writer to the Signet, a partner in a Scottish law firm; Sir Herbert Brittain, K.C.B., K.B.E., aged 65, who retired in 1957 as Second Secretary in the Treasury; H. Collison, member of the National Union of Agricultural Workers and chairman of T.U.C. Social Services Committee; Lord Cranbrook, C.B.E., aged 59, Eton and R.M.A., Woolwich, considerable local government experience, a Deputy Regional Commissioner 1940–45, chairman of a regional hospital board; Miss Vera Dart, O.B.E., Labour member of L.C.C. and chairman of the Children's Committee, 1949–52; E. Milner Holland, C.B.E., Q.C. (about to be knighted), aged 57, Charterhouse and Hertford, chairman of the General Council of the Bar; Major-General Sir Aymer Maxwell, C.B.E., M.C., aged 48, Eton and Magdalene and a farmer; H. Wentworth Pritchard, aged 56, Charterhouse and Balliol, a solicitor in one of the leading firms concerned with local government and other public law questions and a member of the Franks Committee; Viscountess Ridley, O.B.E., associated with hospital work in Newcastle; Lord Strathalmond, aged 71, chairman of British Petroleum, Director of Burmah Oil and National Provincial Bank, petrol adviser to the War Office; and H. W. R. Wade, Barrister-at-Law and a Fellow of Trinity College, Cambridge.[15]

What are we to say of these that has not been said before? It is a team of solid merit, considerable experience, outstanding ability in two or three of its members, and it bats down to number seven or eight (the list above is in alphabetical, not batting, order). It will regard administrative tribunals much as the Franks Committee and the Front Benches regard them. It would be idle to expect a body much differently composed. To revert to my first quotation, it is certainly capable of winning the battle of Blenheim. But its actual job is rather different. The principal function of the Council will be to look at the procedures of tribunals and to report how they can be improved.[16] That is certainly a fairly sizeable nut. But it needs a small and rather special sort of cracker. Not a steamroller.

The refusal of the Government to accept the recommendation that the Council should appoint members of tribunals might look highly sinister and would indeed be sinister if the Committee's main assumption were correct: that tribunals were established to secure independence from Departments. The Committee admitted that they had received no significant evidence that any Departmental influence had in fact been exerted on members, but added, portentously,

[15] 212 H.L.Deb. 1068–73; 596 H.C.Deb. *156–8*; December 3, 1958. *The Times*, December 4, 1958.

[16] The Council has a statutory right to be consulted before procedural rules are made (Tribunals and Inquiries Act, 1958, s. 8).

"present practice can give no guarantee for the future."[17] It is a little lame, when facts refuse to fit assumptions, to cling to those assumptions on the ground that the facts may change and later validate them. The effect of the Act is to empower the Lord Chancellor to produce a panel from which chairmen of many tribunals will be selected.[18] But the appointment of members remains in Ministerial hands though the Council is empowered to make to those Ministers "general recommendations."[19] A person's membership may not be terminated except with the consent of the Lord Chancellor, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland, or any one of these, as is appropriate.[20] Conceivably, and in a quite exceptional case, this may be a valuable provision. I wonder whether there has ever been an instance, in the last fifty years, where this provision would have proved useful. The difficulty is to find qualified persons to sit. If mistakes are made, the practice is to bear with them and then not reappoint. If the circumstances are such that it is imperative that a member should cease to sit (for example, on his criminal conviction for a serious offence) and he refuses to resign, then dismissal would presumably follow; but this is not the sort of case in which the Lord Chancellor is likely to take a stand in defence of the citizen's rights. The provision is a very big net to catch very small fry but perhaps worth having.

The Council, deprived of executive power by the Act and made wholly advisory, can do little harm and may do some good. In the event, all these recommendations on tribunals amount to very little. Now that the shouting and the tumult have died away there is neither in the Act nor elsewhere (apart from the provisions about appeal to the courts and judicial review and the connected provision that tribunals must give reasoned decisions, which are discussed below) much that will noticeably affect the working of these bodies. This is for the most obvious and the best of reasons—that they were functioning well before the inquiry. Rent tribunals had caused some unrest, especially amongst landlords. There was no noticeable outcry that tenants, for whose benefit the legislation was passed, were being unfairly treated. The State was, in the years after 1945, interfering on a fairly large scale, through these tribunals, with the principle that when a commodity is in short supply, it should command a high price to the advantage of those who happen to own it. The interference was quick, drastic and effective. Public-spirited men and women of ability and leisure who could no doubt have conducted these tribunals more openly, fairly and impartially, did not, perhaps fortunately, rush to offer their services. Local councillors and others in working-class areas where

[17] Cmnd. 218, para. 45.
[18] s. 3.
[19] s. 4.
[20] s. 5.

the problem was greatest were probably biased in favour of rents which were within the paying capacity of tenants. Most other tribunals were accepted as efficient. The ordinary applicant for national assistance, national insurance, or industrial injury benefit did not hanker after his day in court. The T.U.C. certainly did not wish to have restored the supreme privilege of fighting cases to the House of Lords. Property owners did not like the basis of compensation but accepted the Lands Tribunal. The truth is that only a certain type of lawyer, politician and constitutionalist dearly loves our system of established courts. The man on the Clapham omnibus and the man in the company's Rolls are alike in this, that they would prefer to be driven in their respective vehicles to any arbitrator or tribunal rather than to the courts.

The tyranny of administrative tribunals has long been Conservative and Liberal party propaganda at a certain level, and this useful and inevitable administrative device was a battlefield in the cold war before the recent firing started. The ammunition has now been largely expended.

## Inquiries

The Committee early on in this Part of its Report attempted to cut the Gordian knot of conceptualism. It speaks of the " administrative " and " judicial " views of the procedures and concludes that they cannot be classified as purely one or the other. " They are not purely administrative because of the provision for a special procedure preliminary to the decision—a feature not to be found in the ordinary course of administration—and because this procedure, as we have shown, involves the testing of an issue, often partly in public. They are not, on the other hand, purely judicial, because the final decision cannot be reached by the application of rules and must allow the exercise of a wide discretion in the balancing of public and private interests." The Committee then rightly discards these categories as unhelpful and sets about applying the tests of openness, fairness and impartiality to the factual situations between Department and citizens, with a warning that the principle of impartiality cannot be applied in this context without qualification.[21]

We are dealing here with interference with property rights—mainly compulsory purchase and clearance orders, development plans and planning applications. The citizen whose land is directly affected is on the defensive. He is not seeking an advantage, as is the applicant for national assistance, or national insurance or industrial injury benefit. He is protecting himself against the demands of the State: that he must sell his land, that he may not build on it. His reaction is a cry which has echoed down the valley of the generations: " I've been robbed." To avoid being robbed he

[21] Cmnd. 218, paras. 272, 277.

will go to most lengths. He will bang any tub and beat any dog. Who shall blame him?

It has not been my intention, by concentrating earlier on the aery-faeriness of the opening parts of the Committee's Report, to suggest that they were incapable of coming to earth. Much the greater part of the Report is commendably practical. And nowhere did the Committee stamp more forcefully and more effectively on the hard ground than in paragraph 278: "One final point of great importance needs to be made. The evidence which we have received shows that much of the dissatisfaction with the procedures relating to land arises from the basis of compensation. It is clear that objections to compulsory purchase would be far fewer if compensation were always assessed at not less than market value. It is not part of our terms of reference to consider and make recommendations upon the basis of compensation. But we cannot emphasise too strongly the extent to which these financial considerations affect the matters with which we have to deal. Whatever changes in procedure are made dissatisfaction is, because of this, bound to remain."

A landowner may feel strongly that the State should not take his field for school building. If he is a large farmer, he will be less worried than a small owner. But both will be incensed if they get less than its market value. The Government has now introduced legislation changing the basis of compensation and much of the agitation against procedures will disappear.

The notion of independence which so dominated the attitude of the Committee towards tribunals is echoed in their attitude to inspectors. The Report sets out the case for departmental and independent inspectors. The arguments for retaining departmental inspectors were four: first, that a Minister is responsible for the final decision which must often be influenced by consideration of Government policy; secondly, that the number of inquiries is sufficient to justify, or even make essential, a corps of full-time inspectors; thirdly, that the technicality of the considerations makes it advisable for an inspector to be constantly engaged in this work and therefore a member of the Department concerned; and fourthly that to establish a corps of independent inspectors, especially under the Lord Chancellor, would foster the impression that the process was judicial, that is, that the final decision was based solely on the evidence at the inquiry, and not including other policy matters. The case for independent inspectors was: first, that public confidence would be increased and the feeling removed that the scales are weighted against the individual; secondly, that the need for the inspector to be conversant with policy is exaggerated and that, anyway, the policy could be conveyed to an independent inspector. Thirdly, that several Departments employ independent inspectors and find this satisfactory; fourthly, that it would be less embarrassing for Departments to give oral evidence before an independent

inspector; fifthly, that it would be less difficult to publish the report of an independent inspector and not so embarrassing for the Minister to give a contrary decision.[22]

Some of these arguments, both for departmental and for independent inspectors, are not very convincing. But the crux seems to be in this matter of policy. Policy is not merely a statement of considerations. It is vaguer than this and less easily reducible to writing. It is a climate, an attitude, an atmosphere. Whatever is done to inform independent inspectors of policy considerations cannot be the same as employing inspectors who are members of the Department which makes the policy. It is a mistake to believe that everything can be reduced to a form of words. Now the Committee recommended that inspectors should be placed under the control of a Minister not directly concerned with the subject-matter of their work and recommended that he should be the Lord Chancellor. The Report continues with these somewhat remarkable sentences: "Some may say that this would be a change in name only, but we feel no need to argue the point because we are convinced that here the appearance is what matters. This change, by no longer identifying the inspector in the minds of the objectors with the Department of the deciding Minister, would emphasise impartiality at an important stage of the adjudication and thus do much to allay public misgiving. We see in this no obstacle to the inspectors being kept in close contact with developments of policy in the Departments responsible for the subject-matter of the inquiries."[23] Now what can this mean? The change is in name only, and the inspectors are to be kept in touch with policy; yet, it would emphasise impartiality. But if this emphasis on impartiality is false, the recommendation does not seem to be particularly commendable. What does "impartiality" mean in this context? That the inspectors are concerned to get at the facts? But no criticism of them was made on this ground. That their recommendations should be impartial? What does this mean? If they are to be instructed on matters of policy, their recommendations will be tinged by policy. The policy will be that of the Department, not of the Lord Chancellor, who has none. This recommendation begins to look like a false façade to "allay public misgiving." If the change is honest and real, then it cannot be a change "in name only." If it is a change "in name only" then it should not be put forward as one to "allay public misgiving."

There is great strength in the argument that to require inspectors to be appointed by the Lord Chancellor is to give the false appearance of a judicial process. It is obviously desirable that the actual proceeding at the inquiry should be fairly and properly conducted, according to the rules of natural justice. In this sense it should be

[22] Paras. 293–302.
[23] Para. 303.

like a judicial process. But other characteristics of the judicial process are lacking: the inspector does not decide but recommends; the decision of the Minister will be influenced by policy. Any reform which manages to give a wrong impression of the nature and purpose of the local inquiry should not be proceeded with. Appointment by the Lord Chancellor is not likely to increase the fairness of the hearing. No complaint is in fact made on that score. The Lord Chancellor is the appropriate person to appoint barristers. But he is not appropriate to appoint architects and surveyors and valuers. And it is not right that the impression should be given that he is, or that an architect appointed by the Lord Chancellor is, somehow and suddenly, a more fair-minded architect than when he is appointed by another Minister. Lord Silkin in a dissenting note argued that inspectors should continue to be appointed by the Minister of Housing and Local Government.[24] The Government rejected the recommendation that inspectors should be appointed by the Lord Chancellor, on the ground that the Minister of Housing and Local Government has to arrange between 5,000 and 6,000 inquiries a year, that this must be done promptly and that inspectors must be fully *au fait* with the Minister's position. Another sop is thrown to Cerberus here. For the Government has stated that the Minister will appoint after consultation with the Lord Chancellor whose consent will also be needed for dismissals.[25] Even Cerberus, who seems to have been a many-empty-headed animal, would refuse that offering.

Dealing with procedure at the inquiry, the Committee recommended that whether proposals are initiated by a Minister or by a local or other authority there should be a statutory requirement that the proposals should be fully explained and supported by oral evidence at the inquiry; and that Government Departments should be required to give evidence.[26] This last recommendation was to meet the widespread criticism of the fact that the Ministry of Agriculture, Fisheries and Food often does not give oral evidence to support their opinion of the agricultural merit of the land in question.

A great deal of discussion took place before the Committee on whether inspectors' reports should be published. The arguments in favour of publication were: first, that the affected citizen should know what the inspector has said to the Minister; secondly, that publication would serve to make the procedures and ministerial powers better understood; thirdly, that it might encourage the Minister to bring forward more evidence at the inquiry so that the chances of his having to disagree with the inspector would be reduced; fourthly, that if publication led to correction of fact, this

[24] p. 100.
[25] 575 H.C.Deb. 410, October 31, 1957.
[26] Cmnd. 218, paras. 308, 314–20.

is better than an appeal on fact; fifthly, that the Ministry of Education publishes the reports of inspectors without any apparent embarrassment.[27] Against publication, it is said, that the report of the inspector is only one of the relevant matters which the Minister must consider and to publish it might give a misleading impression; secondly, that the Minister would be put in an embarrassing position if he had to disagree with his inspector's recommendation; thirdly, that there is no widespread demand for publication which would be expensive; fourthly, that publication would lead inspectors to be less frank in their reports; fifthly, that a report, which must be a summary, would be unlikely to satisfy all parties that they had been adequately reported.[28]

The Committee recommended that the reports should be published. But they made a distinction. That part of the inspector's report which sets out the facts should be available as soon as possible after the inquiry to enable those concerned to suggest to the inspector corrections of fact. The whole report, with recommendations, should accompany the Minister's letter of decision and should also be available on request.[29]

These recommendations seem to be fair and sensible. The decision letter will presumably set out, more fully than it does now, the policy considerations, especially if these lead the Minister to a conclusion contrary to the inspector's recommendation. The opportunity to correct facts is proper. The main objection urged by the Departments was the possible embarrassment to the Minister. It is not easy to see why this should be so. And, in any case, there is no reason why Ministers should not be embarrassed. It would be a sad day when we decided to withhold publicity in order to protect Ministers. The revelations of the evidence in the Crichel Down affair are fresh in our minds. If civil servants are really capable of covering up to that extent, then the flush of embarrassment should be whipped into a hot blaze of positive discomfort. Lord Silkin dissented from the recommendation and thought that inspectors' reports should remain confidential, though he was in favour of the factual part of the report being open to correction.[30]

The Government agreed that inspectors' reports should be published. Or, more precisely, said: "The letter informing the parties of the Minister's decision will in future, in addition to describing the site and summarising the main points put at the inquiry, state the inspector's findings and his recommendation (if any) and then give the Minister's decision with reasons. If the Minister does not accept the inspector's recommendation, the letter will say why. The letter will also state that any recipient may obtain a copy of

[27] Paras. 329–334.
[28] Paras. 335–339.
[29] Paras. 343–346.
[30] p. 100.

the inspector's report if a request for it is made within one month of the date of the letter."[31] The inspector's "findings and his recommendation (if any)" may well be excerpts from his report to the Minister and not the whole report. One wonders, also, whether positive, formal, and stated recommendations will be less frequently made now they are to be published and whether the inspector may be more reluctant to make recommendations which, he suspects, may be controversial in the Department, and which "the Minister" might not accept.

The Government have not accepted the idea of separating the inspector's factual findings and giving an opportunity to correct facts. On the other hand a *statutory* duty has been laid on Ministers to give reasons for their decisions if these follow a procedure which required or could have required a statutory inquiry. And these reasons become part of the decision and are incorporated in the record (so that certiorari will lie if they reveal errors of law).[32]

The Act has little to say about administrative procedures. Section 1 (1) (*c*) empowers the Council "to consider and report on such matters as may be referred [to it by the Lord Chancellor and the Secretary of State for Scotland], or as the Council may determine to be of special importance, with respect to administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry, or any such procedure." The meaning of the last four words is not altogether clear. Do they mean that the Council may report on some aspect of an administrative procedure which they determine to be of special importance even if no statutory inquiry is associated with it? If so, this breaks through the restrictive terms of reference of the Franks Committee. Section 11 deals with the extension of supervisory powers of superior courts and is referred to below. Section 12 requires a Minister, notifying a decision taken by him after the holding by him or on his behalf of a statutory inquiry (or where he could have been required to hold an inquiry), to furnish a statement of the reasons for the decision if so requested. The statement may be refused, or the specification of the reasons restricted, on grounds of national security, and the Minister may refuse to furnish the statement to a person not primarily concerned with the decision if of opinion that to furnish it would be contrary to the interests of any person primarily concerned. Statements of reasons under this section or any other statutory provision form part of the record of the decision.

Most of the changes made as a result of the Franks Report relating to administrative procedures are to be found in circulars issued by Government Departments and of these the most important

[31] Ministry of Housing and Local Government Circular No. 9/58, para. 22.
[32] Tribunals and Inquiries Act, 1958, s. 12.

is Circular No. 9/58 of the Ministry of Housing and Local Government. This relates to Ministerial inquiries into compulsory purchase and clearance orders and into applications for planning permission. In summary, it requires a local authority proposing to acquire land compulsorily to set out in writing the reasons for its proposals and to make these available to those affected as early as possible; it emphasises the need for a planning authority to state fully its reason for refusing a planning application; and for those appearing for a local authority at an inquiry to do everything they can to ensure that the proposals or objections are fully understood and properly supported; "where the Minister is himself the initiating authority, he will make available a statement in writing before the inquiry, and a representative from the Department will be available at the inquiry to explain the proposal and to answer questions in elucidation of it"[33]; departmental witnesses will also appear when a Department has expressed positive views for or against a proposal—and this can include witnesses from the Ministry of Agriculture, Fisheries and Food; the provision concerning the Minister's decision and the publication of reports has been set out above.

The main purpose of this Circular is to make clear to local authorities that anyone whose interests are affected by decisions or proposals of an authority and who wishes to exercise his rights to object or to appeal should know in full the case he has to meet. Hitherto, the amount of information given by local authorities before an inquiry has varied. Administratively, the question has been one of public relations. In planning cases, most authorities would, if approached, seek to help individuals to frame their applications in ways which could be accepted unless there was no room for compromise. In cases of compulsory purchase the reasons for the proposals will be the need for housing or school building or other function and the particular suitability of that individual's land. These reasons were made clear at the inquiry, if not before. It is obviously an improvement that they must now be stated before the inquiry, though it is doubtful if the earlier system in practice worked injustice. The requirement that the Ministry of Agriculture should be represented at the inquiry is wholly to the good. The putting in of letters and statements was unsatisfactory.

Room for improvement in the administrative practices of local authorities, particularly in their relations with individual members of the public, is still considerable. Since 1945 there have been spasmodic efforts to persuade authorities that they can only gain from greater publicity and better public relations but these efforts have not had permanent results. The Council on Tribunals is to look at rules of procedure for inquiries in due course. But what is needed is a close examination of the administrative methods of a

[33] Circular 9/58, para. 13.

large number of particular authorities—an examination which would be quite incomplete if that part of the whole process centred on the inquiry were alone regarded and, incidentally, an examination which obviously the Council is not fitted to undertake.

## Appeal and Judicial Review

The Franks Report said: "The existence of a right of appeal is salutary and makes for right adjudication. Provision for appeal is also important if decisions are to show reasonable consistency. Finally, the system of adjudication can hardly fail to appear fair to the applicant if he knows that he will normally be allowed two attempts to convince independent bodies of the soundness of his case."[34] There is a touching *sancta simplicitas* about that last sentence, combined with an unconscious sophistication. One is left with the picture of a Gloucestershire farmer, whose land has been compulsorily acquired and who has been faced with a district valuer's figure for compensation which he regards as confiscatory, going to the Lands Tribunal and losing; he is met by a sympathetic well-wisher who comforts him with these words: "Ah well, you have been allowed two attempts to convince independent bodies of the soundness of your case. At least I know that the system of adjudication can hardly fail to appear fair to you." Does the farmer reply: "You are quite right. I have been robbed but am filled with admiration for the system"?

Life and human nature are, I think fortunately, not like that. A man wants what he considers to be his "rights." And if he feels deeply enough and is determined enough, he will fight every way to get them. But if finally he loses, he will condemn the law and, deprived of his substance, will not rejoice overlong at the fairness of the procedure. Indeed, he would regard the distinction as sophistry. Colonel Wintle in a celebrated recent case had two attempts to convince independent bodies (the Chancery Division and the Court of Appeal) of the soundness of his case. He failed. And even after his success before the third independent body I doubt if he is today really impressed by the system of adjudication.

No. The problem must be seen less sentimentally and in terms of administrative or judicial finality. There are, of course, advantages in appellate bodies and, as the Franks Committee says, two of these are that it makes for right adjudication (which I take to mean that the existence of a right of appeal makes tribunals of first instance take more care) and can in some cases make for consistency. Since the greater part of most problems which are found in courts or tribunals are questions of fact, the first instance body should be composed and empowered to determine these questions. The appellate body will only in rare cases wish to

[34] Cmnd. 218, para. 104.

dispute the findings of fact. But it may wish to dispute the interpretation of those facts. The Franks Committee would give a general right of appeal—fact, law and merits—to an appellate tribunal but not an appeal on fact to the courts. The Committee was " firmly of the opinion that all decisions of tribunals should be subject to review by the courts on points of law." [35]

At present, the Divisional Court of the Queen's Bench Division has power to review decisions by means of the prerogative orders of certiorari, prohibition and mandamus. This review extends to cases where the tribunal has acted in excess of jurisdiction, or where the basic rules of a fair hearing (the rules of natural justice) have not been followed or where there has been an error of law on the face of the record. The first two grounds need not detain us. The third ground is more difficult. It is important where a tribunal gives its decision and its reasons; and where that decision and those reasons—forming the record—involve a question of law. For example, if the tribunal says: " We decide against the claimant because section 14 (3) of the Act, in our interpretation, is limited to men and does not extend to widows," this is a question of the meaning of statute and is therefore a question of law. It would be argued before the Divisional Court that this interpretation was wrong and if the court agreed, certiorari would issue to quash the tribunal's decision. Again, a statute which established a tribunal might provide for a right of appeal on a point of law to some other body, perhaps the courts or a nominated judge, or some other tribunal. The phrase " appeal on a point of law " includes the three grounds on which the prerogative orders will issue. It goes further and, for example, can be founded on errors of law, such as absence of evidence, elsewhere than in " the record " of the decision. Now the Committee recommended that from decisions of tribunals there should generally be a right of appeal to the courts on points of law. From this the Committee would exclude the decisions of the National Insurance and Industrial Injuries Commissioners and those of the National Assistance Appeal Tribunals. But the Committee emphasises that the remedies by way of certiorari, prohibition and mandamus should continue to be available.[36]

We can perhaps agree that it is desirable that the courts should be able to quash decisions of tribunals where they have exceeded their jurisdiction and dealt with matters they have no power to deal with, or where they have failed to give a proper and fair hearing. But it is less obvious, as a generalisation, that the courts should always have power to review where the question is one of the meaning of regulations. Where this is the case, as for example in national insurance and industrial injuries matters, the Acts almost always provide for a final appellate tribunal consisting of an eminent

[35] Para. 107.
[36] Cmnd. 218, para. 117.

lawyer. Thus the Commissioner in those matters I mentioned is regarded as at least equal in questions of law as a county court judge —whose salary is in fact less than that of the Commissioners—and perhaps of the status of a judge in the Queen's Bench Division of the High Court. The Industrial Injuries Commissioner replaced the courts as a matter of history. Moreover, *in his field*, such a person is a greater expert than any judge could be. Why then should the view of a High Court judge of the meaning of the statutes and regulations in that field be better than his? Wherever we find an administrative tribunal, as an appellate body, presided over by such an expert, we should exclude the courts. For, *ex hypothesi*, we wish to retain the other advantages of speed, informality and cheapness. The Committee did propose that no appeal on a point of law should lie from the Commissioners, or from the National Assistance Appeal tribunals, to the courts. But the Committee insisted that the remedy by way of certiorari should be retained. This means that whenever an error of law on the face of the record is alleged, the point can be taken to the courts. And since the Commissioners wish to state their reasons, for the purpose of building up a body of case law, and do publish very many of their decisions with reasons, there is a great danger that the courts will be able to review a great number of their decisions. This could mean, in the case of industrial injuries, a return to the old days, regarded as bad by both sides of industry, where the question whether an accident arose "out of and in the course of employment" once more comes to be decided by the courts.

The Act followed the Committee's recommendations. In effect it provided that whenever a party to proceedings before a tribunal was "dissatisfied in point of law" with a decision of the tribunal, he could either appeal to the High Court or require the tribunal to state and sign a case for the opinion of the High Court. Rules of court are to be made in elaboration of this provision. National assistance appeal tribunals, national insurance and industrial injuries tribunals are excluded; others are not covered because, generally, there already exists a similar right.[37] Further, the Act provides that any provision in an Act that any order or determination shall not be called into question in any court, or any provision which by similar words excludes any of the powers of the High Court, shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari, or to prejudice the powers of the High Court to make orders of mandamus.[38] This provision, of course, only operates on provisions in Acts passed before the commencement of the Tribunals and Inquiries Act itself. The High Court had already reviewed decisions statutorily declared to be "final." But the new provision is wider

[37] s. 9.
[38] s. 11.

than that. On the other hand, by far the most common use of phrases excluding review occurs where an order (such as a compulsory purchase or clearance order) is made challengeable by special statutory application to the High Court within six weeks on the grounds of *ultra vires* or failure to follow a prescribed procedure. And these cases are expressly excluded from the operation of the new provision. Its effect will therefore be small.[39]

An opportunity has been missed. If the Committee could have got away from the traditional belief in the supreme fitness of the courts to determine all that falls within that vague phrase "questions of law," they might have been able to simplify the system greatly. It would have been possible to provide for appeals on law, fact and merits from one tribunal to another and to have left with the courts the two matters of excess of jurisdiction and breach of the rules of natural justice (for the control of which a simpler proceeding than certiorari or prohibition might have been devised). But now we have the worst of both worlds. Appeals from one tribunal to another (and this perhaps to be extended), certiorari and prohibition for the defects which fall within their scope, the action for a declaration with its glorious though partly unrevealed future, and a general right of appeal on points of law to the courts. We shall soon be asking in those words of the poet which seem to be more and more applicable to administrative powers in these days of freedom or reaction, as you prefer:

> "You use the snaffle and the curb all right
> But where's the bloody horse?"

## Conclusion

The area covered by the Committee's recommendations, the provisions of the Act, and other Government action is considerable and I have not tried to cover every square foot. The Government has said that it could not accept four of the Committee's recommendations: the first was a recommendation that the legal aid scheme should be extended to formal and expensive tribunals and to final appellate tribunals[40]; the second was that the National Health Service Tribunal should in general sit in public[41]; the third was that Ministers should make policy statements before inquiries[42]; and the fourth was that some planning decisions should be delegated to inspectors.[43] Of these the first and third are important. As the Government accepted in principle the recommendation that the right to legal representation should be curtailed only in the most

[39] *Contra* Lord Denning who called this section "a new Declaration of Rights" and the one which would "do most to maintain our liberties" (208 H.L.Deb. 601, April 1, 1958).
[40] Cmnd. 218, para. 89.
[41] Para. 203.
[42] Paras. 287–288.
[43] Para. 392.

exceptional circumstances,[44] to refuse legal aid is illogical and unfortunate. The reason given by the Lord Chancellor for not making preliminary policy statements was that the objector could then think his case was prejudged and would come to the inquiry without much hope. This is disingenuous. The fact is that policy considerations sometimes do prejudge cases and an objector has little chance of success. Why should he not know this? He may still succeed as the exception. The Lord Chancellor continued: "The way I prefer to deal with it is for the Minister to make available a collection of his policy decisions in general matters. May I take, for example, the question of a petrol station? He may say that the limits have been reached in regard to roads where new petrol stations might be erected, or something like that. But to try to say "This is my policy in respect of a specific application" is, I think, very difficult and might do exactly the opposite of what we want to do."[45] This is rather baffling, and seems to suggest that the Lord Chancellor missed the point. Obviously to make some vague remark about limits having been reached would be useless. On the other hand, no one is suggesting that the Minister should say "In the case of this application for this petrol station, my policy is so-and-so." The sort of statement which was surely envisaged was, for example: "The road is in a green belt and there are already ten petrol stations within a radius of ten miles. My general policy is not to permit new petrol stations in green belts in such circumstances." Now the applicant has some idea of where he stands. But he is not precluded from seeking to persuade the Minister that in this case there ought to be an eleventh petrol station. Of course, this would require the Minister to work out certain planning criteria. On past experience this might be considered a dangerous innovation.

I have not sought comprehensively to list all the ways in which the Government has implemented, in part or in whole, many of the Committee's recommendations. No reference has been made, for example, to the provisions of the Agriculture Act, 1958, or the new Town and Country Planning Bill. It would be kind if some M.P. would put down a Question asking for this comprehensive statement. My main reason is not idleness but a decision not to deal in detail with recommendations on individual tribunals.

The opposing armies remain in the field, for this battle on administrative procedures is part of a larger and perpetual warfare, that between individual interests and the State, with the State appearing to the individual sometimes as an overbearing tyrant and sometimes as a reluctant benefactor. At the time of the Donoughmore Committee there was a considerable opinion among left-wing apologists and politicians that the traditional bias in favour of

[44] Para. 87; 575 H.C.Deb. 405, October 31, 1957.
[45] 206 H.L.Deb. 585, November 27, 1957.

private property rights ought to be strongly challenged and that the courts, as the old upholders of those rights, were to be regarded with some suspicion. It seems to me that this movement, which found perhaps its clearest expression in the town and country planning legislation of 1947, has greatly declined in power and evidence of this decline can be seen in the refusal of the Labour Opposition to vote against the Second Reading of the present Town and Country Planning Bill. If this is so, then the Franks Report and its consequences will be remembered as old Kaspar remembered Blenheim, not indeed for its indiscriminate massacre (the Franks Report rolled no heads) but for the contrast between the noise and tumult of the battle and the relative unimportance of the argument which was its cause. There could have been a great battle on great issues. And then the consequences might have been considerable. But this did not happen and, in twenty-five years' time, one whose father was engaged, as was Kaspar's, may look back and say:

> "But what they fought each other for,
> I could not well make out;
> But everybody said," quoth he,
> "That 'twas a famous victory."

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# THE PROBLEM PROMISSORY NOTE: A QUESTION OF ESTOPPEL

## The Problem Stated

Where the maker of a promissory note payable *on demand* has paid or otherwise discharged it but allows it to remain in the hands of the payee who subsequently indorses it for value to an innocent party, can the latter maintain an action on the note against the maker of it? [1]

A sound moral answer to the question is provided by Ashurst J.'s dictum in *Lickbarrow* v. *Mason* [2] that "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," but this maxim is now so crippled by qualifications that it remains at best no more than a common-sense basis for the sophisticated modern doctrine of estoppel. The search for the legal answer to the riddle, however, is complicated by the fact that an adequate solution cannot be found in the usual quarters, neither purely within the sections of the Bills of Exchange Act [3]—for the problem posed appears to be a rare *casus omissus*—nor in the decided cases which, apart from *obiter dicta* by Lord Esher in *Glasscock* v. *Balls* [4] and Smith and Collins L.JJ in *Nash* v. *de Freville*,[5] give little direct assistance, nor again in the leading textbook—Chalmers on *Bills of Exchange*—which is misleading on this particular point. It will be suggested in this article that the doctrine of estoppel is the key to the conundrum and that the "holder in due course" is entitled to succeed, but first the decks must be cleared of possible arguments in favour of the maker of the note whose carelessness in allowing it to remain in the hands of the payee after it had been discharged by payment must surely be condemned alike by the law and the dictates of commercial practice.

Section 36 (1) of the Act declares that "where a bill is negotiable in its origin it continues to be negotiable until it has been

(*a*) restrictively indorsed, or,
(*b*) discharged by payment or otherwise."

[1] The indorser of the note is, of course, precluded by s. 55 (2) (*c*) of the Bills of Exchange Act from denying to his immediate or a subsequent indorsee that "the bill was at the time of his indorsement a valid and subsisting bill and that he had then a good title thereto." The maker of a promissory note is, however, the principal debtor on the instrument: *Chartered Bank* v. *Dickson* (1870) L.R. 3 P.C. at p. 580.

[2] (1787) 2 T.R. 63; 1 Smith's L.C. (13th ed.), p. 703.

[3] 1882 (45 & 46 Vict. c. 61), hereafter referred to as the Act.

[4] (1889) 24 Q.B.D. 13.

[5] [1900] 2 Q.B. 72, C.A.

Section 29 (1) defines a holder in due course as a person "who has taken a bill, complete and regular on the face of it, under the following conditions, namely:

(*a*) that he became the holder of it before it was overdue, and without notice that it had previously been dishonoured, if such was the fact;

(*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

The main argument for the maker of the note will rest on a strict literal interpretation of section 36 (1). It will be argued that once a bill has been paid and discharged it ceases to be negotiable, in terms of section 36 (1), and loses the character of a "bill," and cannot, therefore, fall into the hands of a holder in due course who is defined in section 29 (1) as the taker of a "bill." This argument is best summarised in the words of Chalmers who says: "Payment and other discharges are sometimes spoken of as equities attaching to a bill, but this seems incorrect—they are rather grounds of nullity. That which purports to be a bill is no longer such; it is mere waste paper." [6] If this is merely a more emphatic way of stating that a bill when paid or otherwise satisfied is "discharged," the statement is free from objection; but if, as one suspects from the description of a discharged bill as "waste paper," the learned author implies that a holder in due course cannot in any circumstances (even by estoppel) acquire rights on a discharged bill, the statement is unsupported by authority and is, it is submitted, incorrect in relation to the special case of a promissory note payable on demand, which does not appear to have been clearly contemplated by the draftsmen of the Act. Then again at page 185 Chalmers says: "A bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable, and if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument." Four cases are cited for this proposition—*Harmer* v. *Steele*,[7] *Burchfield* v. *Moore*,[8] *Burbridge* v. *Manners* [9] and *Cundy* v. *Marriott* [10]—but on a close examination of these cases it will be seen that in only one of the four was the plaintiff a holder in due course and only a dictum in that case lends even a semblance of support to the latter half of the proposition.

There are three objections to a strictly legalistic approach to the problem. In the first place, insistence on the rigid application of section 36 (1) in the special case of a promissory note payable on

[6] Chalmers on *Bills of Exchange* (12th ed.) p. 116.
[7] (1849) 4 Exch. 1.
[8] (1854) 23 L.J.Q.B. 261.
[9] (1812) 3 Camp. 194.
[10] (1831) 1 B. & A. 696.

demand which has been discharged but allowed to remain in circulation, leads to a conflict between section 36 (1) and section 29 (1) which is avoidable if the problem posed in this article is treated as a *casus omissus*. Secondly, while the cases cited by Chalmers do not bear out his proposition that a holder in due course cannot in any circumstances sue on a discharge bill or promissory note, *obiter dicta* in at least two cases support the rights of a holder in due course of such a note, although the question does not appear to have arisen directly in a single reported decision. Thirdly, if the problem considered in this article cannot be solved by recourse to the provisions of the Bills of Exchange Act the doctrine of estoppel is at hand to bridge the gap.

The privileged status of a holder in due course is accorded only to those holders of a bill or promissory note who are able to satisfy the exhaustive conditions enumerated in section 29 (1). The bill must be "complete and regular on the face of it" and be taken "before it was overdue" and "without notice that it had previously been dishonoured" (if such was the fact), "in good faith" and "for value" and "without notice of any defect in the title of the person who negotiated it." Thus, it is true to say, with two exceptions, that where a bill has been properly discharged by payment or otherwise there cannot possibly be a holder in due course of such a bill, for the discharge is either proclaimed on the face of the bill or the bill contains a warning which, by putting the holder on inquiry, precludes him from claiming the status accorded by section 29 (1). For instance, the Act provides that a bill may be discharged in four ways beside payment and the methods of discharge known to the common law. A bill or note is discharged when after maturity the acceptor of a bill (or maker of a note) becomes its holder [11]; or when at maturity the holder of a bill absolutely and unconditionally renounces, in writing, his rights against the acceptor [12]; or where the bill is intentionally cancelled [13]; or where there has been a material alteration of the bill, provided in the latter case that a holder in due course is not affected unless the alteration is apparent on the face of it.[14] It is extremely unlikely that an attempt will be made to negotiate a

[11] s. 61.
[12] s. 62.
[13] s. 63.
[14] s. 64. This section reads as follows: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered; and may enforce payment of it according to its original tenor." The moment the alteration takes place the bill is discharged and, therefore, in terms of s. 36 (1), ceases to be negotiable, but the rights of a holder in due course are not affected. Thus, it is clear from this section that it is not a contradiction in terms to speak of a holder in due course of a discharged bill.

bill which has been discharged and marked in the foregoing manner. With regard to discharge by payment the Act provides that for payment to operate as a discharge it must be payment in due course, *i.e.*, at maturity.[15] Thus where a bill is issued payable at a future date, payment in anticipation of that date, although it is valid *inter partes*, does not affect the rights of a bona fide holder for value who acquires the bill before it is due.[16] In such a case the rights of the immediate parties to the bill are extinguished by the prior payment, but the bill itself remains valid. On the other hand, the taker of a bill which has been negotiated after it became due is not a holder in due course; "he is a holder with notice, and for this reason: he takes a bill which on the face of it ought to have got home and been paid."[17] It is clear law that besides payment and the methods of discharge provided by the Act, a bill or note may be discharged in various other ways, such as by merger, satisfaction, waiver, novation and release, which would, at common law, suffice to extinguish the obligations arising out of a contract. For instance, the taking of a co-extensive security of a higher nature for a bill or note merges the remedy on, and operates as a discharge of, the inferior instrument.[18] Although the holder of a bill is entitled to receive money, *when the time of payment comes* he may, if he chooses, receive satisfaction in any other form, *e.g.*, by accepting a horse. "Any satisfaction which would operate as a discharge in the case of an ordinary contract to pay money is equally effectual in the case of a bill."[19] But whereas premature payment, or any other premature discharge is, of course, valid *inter partes*, it does not operate as a discharge of the instrument itself.[20]

In all the foregoing cases, where there has been a valid discharge of the bill itself, as opposed to a discharge of the parties to it, the fact is evident on the face of the bill or there are attendant circumstances which serve to put a subsequent holder on his guard. But the odd case which falls outside the pattern is a promissory note payable on demand, for such a note is a continuing security payable at any time after issue, and when it has been paid it is deemed to have been paid at maturity.[21] However, where it has been paid and subsequently, without coming back into the hands of the maker, has been indorsed to a bona fide holder for value, the holder is, within the terms of section 29 (1), a holder in due course, for although the note has in fact been properly discharged it carries no warning on the face of it and, unless it has been in

15 s. 59.
16 *Burbridge* v. *Manners* (1812) 3 Camp. at p. 194; Chalmers, *op. cit.*, p. 188.
17 Chalmers, *op. cit.*, p. 166.
18 *Twopenny* v. *Young*, (1824) 3 B. & C. 208.
19 Chalmers, *op. cit.*, pp. 185, 188.
20 See *Dod* v. *Edwards* (1827) 2 C. & P. 602; *Cripps* v. *Davis* (1843) 12 M. & W. 159; *Ashton* v. *Freeston* (1840) 2 Man. & G. 1.
21 See s. 86 (3).

circulation for a very long time,[22] gives the holder no hint that it might have been paid and discharged.[23] Section 36 (1) merely states that a discharged bill ceases to be negotiable, but it cannot be denied that to all outward appearances it remains a "bill," for a "bill" is defined formally in section 3 (1) as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer." Subsection (2) declares that "An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange." Now, negotiability is undoubtedly the outstanding characteristic of a bill of exchange, but nowhere in the Act is it stated that a bill which ceases to be negotiable also ceases to be a bill.[24] The distinction is important for although, as we have seen, in nine cases out of ten section 36 (1) and section 29 (1) work in perfect harmony because in those cases there cannot possibly be a holder in due course of the discharged bill, in the exceptional case of a promissory note payable on demand the holder of it is entitled to claim the benefit of the status of a holder in due course by insisting on a strict interpretation of section 29 (1), and to assert that section 29 (1) overrides section 36 (1).[25] In other words, although the note which came into his hands had ceased to be negotiable when it was discharged by payment, he is, nevertheless, a holder in due course. This argument, it is submitted, is plainly consistent with the general policy of section 29 (1), for the *rationale* of the rule embodied in that section lies in the manifest unfairness of penalising a bona fide indorsee, by depriving him of his right of action on the note or bill, on the occurrence of an event which he could not reasonably be expected to have known or discovered. The section is clearly designed to safeguard the rights of an innocent holder who has been misled by the appearance of a bill or note into believing that it was genuine; if the point and purpose of the section are to protect the blameless victim of deception then, *a fortiori*, it should make no difference in principle that what appears to be genuine turns out to be spurious.

None of the cases cited by Chalmers adversely affects the argument set out above. *Harmer* v. *Steele*[26] dealt with a bill of exchange drawn by W on, and accepted by, the defendants,

[22] s. 86. In *Brooks* v. *Mitchell* (1841) 9 M. & W. 18, a promissory note payable on demand in circulation fifteen years after issue was held not to be overdue.

[23] In *Cripps* v. *Davis*, Parke B. recognised and appreciated the unique position of the holder of a promissory note payable on demand. See also Lord Kenyon in *Brown* v. *Davies* (1789) 3 T.R. 80.

[24] It is significant that in s. 210 of the New York Negotiable Instruments Law the definition of a bill is confined to negotiable bills.

[25] See s. 38 for the rights of a holder in due course.

[26] (1849) 4 Exch. 1.

payable to the order of W, six months after date, and indorsed by W to the plaintiff *after it became due*. Wilde C.J. said: "There is no doubt that, when a bill has been paid at maturity by the sole acceptor to a third person, who is the holder, no action can afterwards be brought upon the acceptance; and it is equally certain that if one of several joint acceptors pays the bill at maturity to such third person, being the holder, the contract of acceptance is performed and no action can be maintained upon it." The plaintiff in this case, having taken the bill after it became due and from the hands of one of the acceptors, was by definition doubly excluded from claiming the rights and status of a holder in due course, and it is submitted, therefore, that the principle laid down in *Harmer* v. *Steele* does not cover a case where the maker of a promissory note payable on demand is sued by a subsequent indorsee for value who had no possible means of knowing that the note had been discharged as between the maker and the payee. In *Burchfield* v. *Moore*,[27] which was decided in 1854 and expressed the common law as it then stood, Lord Campbell held that the unauthorised alteration of a general acceptance of a bill, by the addition of a place of payment, discharges the acceptor, even as against a bona fide holder, who subsequently takes the bill for value and without notice of the alteration. This principle was substantially embodied in section 64 of the Act,[28] but the proviso to that section admitted an exception to the rule which completely destroys the value of the case as an authority for the proposition advanced by Chalmers. In *Cundy* v. *Marriott*[29] the vendee of goods gave the vendor an instrument purporting to be a bill of exchange in payment of his debt, but it was written on a piece of paper which had not affixed to it a sufficient stamp. It was not paid by the acceptor, but the vendor (the indorsee of the bill) did not give any notice of dishonour to the vendee, who was the indorser. It was held that, the instrument being of no value for want of a stamp, notice of dishonour was unnecessary and the plaintiff was allowed to recover the goods sold. The instrument in this case which purported to be a bill of exchange was null and void *ab initio* for want of a sufficient stamp and never enjoyed the character of a negotiable instrument. Moreover, the plaintiff was not a holder in due course for he was the payee,[30] and the bill was not "complete and regular on the face of it." This case is, therefore, quite irrelevant to the proposition for which it is cited as authority. *Burbridge* v. *Manners*[31] was an action on a promissory note payable three months after date to the defendant,

27 (1854) 23 L.J.Q.B. 261.

28 *Supra*, n. 14, especially the proviso to s. 64.

29 (1831) 1 B. & Ad. 696.

30 The original payee of a bill or note cannot be a holder in due course: *Jones* v. *Waring and Gillow* [1926] A.C. 670 at 680, H.L.

31 (1812) 3 Camp. 194.

indorsed by him to one T and by T to the plaintiff. The note was regularly presented for payment in the forenoon of the day it became due, when payment was refused, and in the afternoon of the same day the plaintiff caused notice of dishonour to be sent to the defendant. The defendant pleaded that while the bill lay with the bankers of one of the indorsees some unknown person paid it and carried it away without it being cancelled, or any memorandum being made upon it, and counsel for the defendant contended that after the bill had once been paid it could not be reissued. Lord Ellenborough, in giving judgment for the plantiff, said: "Had the bill been due before it came into the plaintiff's hands, he must have taken it with all its infirmities. In that case it would have been his duty to inquire minutely into its origin and history. But receiving it before it was due, there was nothing to awaken his suspicion. I agree that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent indorsee." This dictum must now be read in the qualified sense that a bill can be reissued provided it carries a fresh stamp in compliance with the Stamp Act.[32] Further, "a note cannot be said to be reissued unless it has first come—not perhaps necessarily into his hands, but certainly into the power and control of the maker." [33] Thus where a bill has been paid but allowed to remain in the hands of the payee who puts it into circulation, the bill is not deemed to be reissued.

In neither of the last two cases was the issue discussed here squarely before the court, and on the occasion, which has not yet arisen, when a court will be called upon to resolve the competing rights of, on the one hand, a holder in due course who took the note believing it to be valid, and on the other, the maker of the note claiming that it was discharged as between himself and the payee, it will be futile to argue that the dicta in those cases and the statement in Chalmers cover the exceptional case of a promissory note payable on demand which in all probability was not even contemplated when those opinions were expressed. There is, however, one case which is important in the present context. In *Bartrum* v. *Caddy* [34] two persons, Hatherley and Hamlyn, were jointly indebted to one Bartlett in £200 for which he required a security. The defendant, at their request and for their accommodation, indorsed a blank promissory note payable on demand and delivered it to them for the purpose of depositing it with Bartlett as security. Hatherley and Hamlyn paid their debt to Bartlett and the latter thereupon redelivered the note to them. Hamlyn subsequently delivered the note to the plaintiffs to secure a debt due from himself alone to the plaintiffs and without defendant's authority. Judgment was given for the defendant on two

[32] See s. 37 of the Bills of Exchange Act.
[33] Lord Esher in *Glasscock* v. *Balls* (1889) 24 Q.B.D. 13 at 15.
[34] (1838) 9 Ad. & E. 275.

grounds, *viz.*, (1) that the bill had been paid and discharged prior to its indorsement to the plaintiffs, and (2) that it had been reissued by the maker. Lord Denman C.J. said: "It is sufficient for the present case to say that the sum for which this note was given has been paid, and the bill redelivered. Then the Act of Parliament, 55 Geo. 3, c. 184, s. 19, applies, and prohibits the reissuing of it. *Freakley* v. *Fox* assumes the same doctrine."[35] And the other judge, Patteson J. said: "Here the note had returned into the hands of the makers, and neither of them had any power to put it into circulation again." In *Glasscock* v. *Balls* Lord Esher distinguished *Bartrum* v. *Caddy* on the ground that in the latter case the plaintiff failed because the note had been returned to, and reissued by, the makers of the note; and he treated this factor as an important element of the *ratio decidendi* in *Bartrum* v. *Caddy*, the suggestion being that prior payment alone would not have prevented the plaintiff from recovering.[36] If the note had been retained by Bartlett after Hatherley and Hamlyn had paid him and been issued by him to the plaintiffs, *Bartrum* v. *Caddy* would have been the decisive authority, the solution to the problem set out at the beginning of this article. As it is, however, the investigation must be carried a stage further.

That the doctrine of estoppel might be the answer to the problem was barely hinted at by Lord Esher in *Glasscock* v. *Balls*. The defendant being indebted to W gave him as security a promissory note payable on demand to W's order, and afterwards as additional security a mortgage of certain property. By a transfer, to which the defendant was not a party, W transferred the mortgage to H for a sum in excess of the debt secured by the note. The note remained in W's hands, who indorsed it to the plaintiff for value. The plaintiff took the note in good faith and without notice of the circumstances. It was held in an action by the plaintiff, as indorsee, against the defendant, as maker of the note, that the note had not been reissued, or even paid, and that the plaintiff was entitled to recover. *Bartrum* v. *Caddy* was distinguished on the ground that here neither was the note paid (transfer by W of the mortgage not being tantamount to payment) nor was it reissued, for a note cannot be reissued unless it has come into the power and control of the maker. And Lord Esher added:

[35] In *Freakley* v. *Fox* (1829) 9 B. & C. 130, it was held that where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note, even by a person to whom the executor has indorsed it. The present right to receive payment and the present liability to pay concurring in the same person the debt is deemed to be discharged. A person who takes a note from the maker of it takes it from a contaminated source and cannot claim to be a holder in due course.

[36] Where a decision rests on two grounds, both grounds are included in the *ratio decidendi* of the case: *per* Devlin J. in *Behrens* v. *Bertram Mills Circus, Ltd.* [1957] 2 Q.B. 1 at 25.

> "So that if a note, although it has been paid, nevertheless remains current, there is nothing to prevent an indorsee recovering upon it."

*Glasscock* v. *Balls* was cited in argument, although it was not referred to in the judgment, in *Nash* v. *de Freville*.[37] Here the defendant placed three promissory notes made by himself in the hands of P as security for sums due from the defendant to P, taking from him a promise not to negotiate them. He afterwards gave him two others in substitution for the first three but suffered the first three to remain in P's possession. All the notes were payable on demand. P, in violation of his promise, passed all five notes to the plaintiffs, innocent holders for value, who thereby acquired a good title against the defendant. After the payee had so negotiated the notes the defendant paid to him the amount due on the last two notes, but the defendant was not aware that the payee had parted with the notes, and did not ask for or receive any of them from him. Collins L.J. cited the well-known principle in *Lickbarrow* v. *Mason*[38] and went on to say "that the defendant having handed to and left in the possession of P instruments *on their face negotiable*[39] was estopped from setting up against the plaintiffs any fact which as between defendant and P would have debarred P from negotiating them. . . . Here the estoppel is raised by the handing to P by the defendant of negotiable instruments as such, which, as pointed out by Bramwell and Brett L.JJ. in *Baxendale* v. *Bennett*,[40] is a very different thing from depositing for safe custody securities capable of being negotiated; and, further, in the case of these first three bills, neglecting to resume possession of them. . . . On the whole, therefore, I think in this case there is no technical difficulty to prevent the application of the broad principle which I have named; that the defendant is 'he who has enabled' P to occasion the loss; that he must, therefore, sustain it . . . Estoppel is the foundation of rights arising upon the unauthorised transfers of negotiable instruments."[41] Smith L.J. pointed out that "the difficulty which the defendant unfortunately is in arises through his own default in not getting the notes back from P when he paid them, thereby giving P the opportunity of cheating the plaintiffs as he did." Since the notes were paid only after they had left the hands of the payee they were good and valid notes in the hands of the holder in due course, and it cannot, therefore, be confidently asserted that *Nash* v. *de Freville* is a clear authority for the proposition that where a promissory note payable on demand has been paid a holder in due course may in certain circumstances

[37] [1900] 2 Q.B. 72, C.A.
[38] (1787) 2 T.R. 63; 1 Smith's L.C. (13th ed.), p. 703.
[39] My italics.
[40] (1878) 3 Q.B.D. 525, C.A.
[41] See *Russell* v. *Langstaffe* (1780) 2 Doug.K.B. 514; *Schultz* v. *Astley* (1836) 2 Bing.N.C. 544; *Ingham* v. *Primrose* (1859) 7 C.B.(N.S.) 82.

acquire a right to sue on it. But in view of the strong opinions expressed by both Smith and Collins L.JJ. on the question of estoppel, there is little room for doubt that their decision would have been the same even if the notes had been paid before indorsement to a holder in due course.

If the solution to the problem posed in this article can be found within the provisions of the Bills of Exchange Act, then, it is submitted, for the reasons set out above, the holder in due course must succeed against the maker of the note. But if the better view is that the problem cannot be solved in terms of the Act, the doctrine of estoppel, operating independently of the Act, may be called in aid. The estoppel arising against the maker of the note may be put either on the footing of his negligent conduct in allowing a discharged note to remain in the hands of the payee (estoppel by negligence) or on the basis of ostensible ownership (estoppel by representation). Of the two possible pleas the latter is the easier to maintain, for although there is no binding decision on the point the argument on principle appears unanswerable. One gathers, however, from a passage in Halsbury's *Laws of England*[42] that the proper plea "where a person pays what is due on a negotiable instrument and after payment leaves it in the hands of the holder" is estoppel by negligence. By no means a self-evident proposition, this statement is in a sense misleading for two reasons. First, the case cited in support of it is *Nash* v. *de Freville* in which, as we pointed out earlier, the notes had not in fact been discharged, although of course it is arguable that the decision would have been the same even if the notes had been discharged. Secondly, in the absence of authority, it is a moot point whether a court would recognise a duty on the part of the maker of a note to withdraw it from circulation once it has been paid.[43]

That the existence of a duty is the essential basis of estoppel by negligence was established by Blackburn J. in *Swan* v. *North British Australasian Company*,[44] where he said that the neglect must be of some "duty owing to the person led into the belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or, even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy." The consensus of judicial opinion seems to favour the view that a person's negligent conduct will only estop him where that conduct has been in breach of a duty owed by him to the person defrauded,[45] but it is not always easy to

[42] (3rd ed.), Vol. 15, p. 246.

[43] In *Nash* v. *de Freville* the estoppel was based on Ashurst J.'s dictum in *Lickbarrow* v. *Mason* and not on the existence of a duty.

[44] (1863) 2 H. & C. 175 at 182.

[45] See *Bank of England* v. *Vagliano Bros.* [1891] A.C. 107 at 171; *Farquharson Bros.* v. *King* [1902] A.C. 325 at 332; *Keppitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.* [1909] 2 K.B. 1010 at 1024; *Mercantile Bank of*

ascertain whether in a particular case the party estopped owed a duty to an originally unknown member of the public who has suffered loss by his negligent conduct. One must look to the decided cases for definitions of the kind of conduct which will suffice to work an estoppel, but there have been unsatisfactory decisions and considerable confusion as to what circumstances give rise to such a duty, particularly in cases of assisted or indirect misrepresentation,[46] where from the necessity of the case there can be no privity between the person in whose favour the estoppel arises and the person estopped and, consequently, no contractual duty can exist. But Dr. Ewart suggests[47] that there is a general duty upon every person, exactly comparable to the duty which is the basis of the law of tort, "to observe an appropriate measure of prudence to avoid causing harm to others." He argues that a person "should take care that he is not made an accomplice, or even an unwitting instrument in frauds upon others; he should refuse to give opportunity or occasion for misrepresentation, and, profiting by experience of recurring rascalities, he should so use his own liberties as not unnecessarily to expose others to the machinations of defrauders."[48] There certainly are cases in which the existence of a duty with regard to negotiable instruments has been adverted to. Thus in *Coventry* v. *Great Eastern Railway*,[49] Brett M.R. said: "It is true that there can be no negligence unless there be a duty, but here the documents have a certain mercantile meaning attached to them, and therefore the defendants owed a duty to merchants and persons likely to deal with the documents." In this case the defendants had negligently issued two delivery orders for one consignment of wheat, and the plaintiff, acting on the reasonable belief that they related to two distinct consignments, advanced moneys on both orders to the person who held them. On that person's bankruptcy, it was held that the defendants were estopped by their negligence from showing that the two delivery orders related only to one consignment of wheat. Then again in *Wilson and Meeson* v. *Pickering*[50] Lord Greene M.R. said: "It is understandable that there should be a special rule of estoppel in the case of negotiable instruments which, broadly speaking, pass like currency from hand to hand. They are in a sense dangerous things since, if a doubt exists as to the right of a holder in due course to rely on their apparent authenticity, consequences will follow highly prejudicial to the confidence which is required for the due conduct of commercial affairs." On the other hand, Bowen

*India, Ltd.* v. *Central Bank of India, Ltd.* [1938] 1 All E.R. 52 at 59. See also 55 L.Q.R. 400 at 411.

[46] *i.e.*, a representation made by another but in circumstances which render the person against whom the estoppel is asserted responsible for it.

[47] *Estoppel by Representation*, p. 37.

[48] *Op. cit.*, p. 37.

[49] (1883) 11 Q.B.D. 776 at 780.

[50] [1946] K.B. 422 at 428.

L.J. held in *Le Lièvre* v. *Gould* [51] that for the purpose of founding an action for damages in tort "the law of England does not consider that what a man writes on paper is like a gun or other dangerous instrument," and in *Heskell* v. *Continental Express, Ltd.*,[52] which was an action for damages by an export merchant against a shipper arising out of the negligent issue of a bill of lading by the latter when the goods had in fact never been shipped to the buyer, counsel for the plaintiff, in putting forward the proposition that the ship-owner owed a duty to the public not carelessly to circulate a document of title knowing it would be used as such, acknowledged the difficulty he encountered because of *Le Lièvre* v. *Gould* and other similar decisions which made it plain that negligent misstatements can never give rise to a cause of action. Devlin J. pointed out that a bill of lading was a document of title because it contains a statement by the master of a ship that he is in possession of cargo, and an undertaking to deliver it, and added that he could not "see why carelessness in making this sort of statement should be distinguished from negligent misstatement generally." [53] "In any event," he said, "the authorities show that the issuing of a document of title or negotiable instrument is not of itself the subject of any general duty. The drawer or acceptor of a bill owes no duty to the public at large 'not to be negligent with regard to the form of the instrument.'" Later in his judgment Devlin J. drew attention to the distinction between a bill of lading and a bill of exchange by saying: "A bill of lading contains not only or primarily a statement of fact, but a promise to deliver goods. The issue of a cheque may imply a representation that the drawer has funds in the bank wherewith it may be met, but the drawer's immunity from suit for a negligent misstatement to that effect causes no inconvenience. The cheque is an order to pay, and non-compliance with it gives a right of action irrespective of negligent misrepresentation." [54]

Two points must be made to amplify this vital distinction. In the first place, the refusal of the courts to treat a document as a dangerous instrument for the purpose of founding an action for damages in tort, does not necessarily negative the existence of a duty on the maker of a promissory note payable on demand to withdraw it from circulation after it has been paid, for the action in the latter case is based, not on a negligent misrepresentation as to the existence of a state of affairs, but on a promise to pay money, moving directly from the maker of the note to its holder for value. The duty in such a case is analogous to, although it

[51] [1893] 1 Q.B. 502. This dictum is criticised by Winfield, *Law of Tort* (6th ed.) p. 463; Salmond, *Torts* (11th ed.) p. 502; Wilson, "Chattels and Certificates in the Law of Negligence," 15 M.L.R. 160; see, however, *Candler* v. *Crane, Christmas and Co.* [1951] 2 K.B. 164.

[52] [1950] 1 All E.R. 1033.

[53] Approved by Cohen L.J. (as he then was) in *Candler* v. *Crane, Christmas and Co.* [1951] 2 K.B. 164 at 198.

[54] [1950] 1 All E.R. 1033 at 1045.

is not, as suggested by Dr. Ewart, coterminous with, the duty of care in tort, for negotiable instruments are by their very nature in a class by themselves with special rules of their own. Secondly, while it is one thing to say that there is no duty on the drawer or acceptor of a bill of exchange not to be negligent with regard to the form of the instrument in anticipation of fraudulent conduct by a subsequent holder,[55] entirely different considerations must apply where the maker of a discharged note by allowing it to remain in the hands of the payee provides the latter with every opportunity to cheat an innocent member of the public. Moreover, section 52 (4) of the Act, by declaring that " when a bill is paid the holder shall forthwith deliver it up to the party paying it," confers on the maker of the note a right to demand that it be returned or destroyed after payment, but where the maker of the note fails to act under a section which is designed for his protection it seems unreasonable that a member of the general public should have to pay for that neglect. It would be proper, therefore, in the circumstances, to impose on the maker of the note a duty towards the general public to withdraw the note from circulation or destroy it or indicate on the face of it the fact that it has been paid.

So far the case for the holder in due course has been considered in relation to the negligence of the maker of the note, but the plea of estoppel can be put on the alternative footing that the conduct of the maker of the note, in allowing the note to remain in the hands of the payee after payment, amounted to a representation that the note was a valid and subsisting one to which the payee had a good title, and that the maker remained primarily liable to pay it. On this view of the matter, although the element of negligence may be present in the form of the careless conduct of the maker, it is not relied on to support the estoppel. One would have thought, therefore, that the existence of a duty on the part of the maker of a note (a *sine qua non* when negligence is pleaded) would not be required where negligence is irrelevant. But here we encounter a difficulty. In the *Mercantile Bank of India* v. *The Central Bank of India*,[56] Lord Wright appears to have reached the conclusion that it is in general necessary when reliance is placed upon an estoppel by representation to show a breach of duty by the party said to be estopped. Two banks were in the habit of making loans to merchants on the security of goods consigned to them, the practice being that the merchant should deliver to the bank the several railway receipts covering the consignment. The bank would then pass the railway receipts on to their own godown keeper so as to enable him to obtain possession of the goods, and he in turn would hand the railway receipts back to the merchants for the specific purpose of clearing the goods and storing

[55] But a customer owes a duty to his bank to draw a cheque without leaving spaces—*London Joint Stock Bank* v. *MacMillan* [1918] A.C. 777, H.L.

[56] [1938] 1 All E.R. 52. See the editorial note.

them in the bank's godown. One firm of merchants, having in this manner got the receipts back into their hands, obtained an advance from the second bank on the security of the same receipts. The merchants were declared insolvent, hence the action—for damages in tort (conversion)—by the first bank against the second. The defendants argued that the plaintiffs were precluded by their conduct from denying that the merchants had the right of pledging the goods as owners, the estoppel being based either on the negligence of the plaintiffs in handing back the receipts or on the representation, resulting from their conduct, that the merchants were free to dispose of the goods as the absolute owners of them. The argument on negligence failed because " all that the plaintiffs did was to deal with their own property, as pledgees, in the usual course of business, which was well known to, and followed by, both the plaintiffs and defendants." In the circumstances, they owed no duty to the defendants. But it is really with the alternative argument based on ostensible ownership that we are now concerned. Counsel for the defendants contended that the necessity of a duty to constitute an estoppel applied only to an estoppel based on negligence, whereas an estoppel based on representation was different. He submitted that the railway receipts on their face conveyed a representation, when presented by the merchants to the defendants, that the merchants were invested with the full disposing power, and that no question of duty or negligence arose on this view of the position. Lord Wright's answer to this contention was, with respect, unconvincing. He cited two cases—*London Joint Stock Bank* v. *MacMillan*[57] (customer owes a duty to his bank to draw a cheque without leaving spaces) and *Scholfield* v. *Earl of Londesborough*[58] (drawer of a cheque owes no duty to the public to draw it carefully)—presumably (because he does not say so expressly) in favour of the view that a duty must be established even where the estoppel is by representation, but in both these cases the estoppel was clearly based on negligence. His Lordship also referred to *Henderson and Co.* v. *Williams*[59] and *Fuller* v. *Glynn, Mills, Currie and Co.*[60] where the plea of estoppel by representation succeeded—both cases of " pure estoppel "[61]—and distinguished them on the facts, without any reference to the fact that in neither of these cases was the success of the plea dependent on the existence of a duty. His Lordship was, it is submitted with respect, on safer ground in holding that the railway receipt could not bear the construction which counsel for the defendants sought to put upon it, for it was, at best, an ambiguous document. " Its possession no more conveyed a representation that the merchants were entitled to

[57] [1918] A.C. 777.
[58] [1896] A.C. 514.
[59] [1895] 1 Q.B. 521.
[60] [1914] 2 K.B. 168.
[61] A term used by Farwell L.J. in *Rimmer* v. *Webster* [1902] 2 Ch. 163 at 173 to describe estoppel by representation.

dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. *It is not like a negotiable instrument*[62]; the possession of the railway receipt is no more significant for this purpose than the possession of the goods would have been." Moreover, in a recent judgment the Court of Appeal made no reference to Lord Wright's view that a duty must be shown to exist even where the estoppel is by representation. *Central Newbury Car Auctions, Ltd.* v. *Unity Finance, Ltd., et al.*[63] was an action for damages for conversion of a car and the decision turned on the nature of the representation made by the delivery of a motor-car, together with its registration book, to a stranger. Hodson L.J. said[64]: "The mere handing over of a chattel to another does not create an estoppel, and there will be no estoppel unless the doctrine of ostensible ownership applies, as, *e.g.*, when the owner gives the recipient a document of title or, as has often been said, invests him with the indicia of ownership." He considered the plea of estoppel first from the point of view of the negligence of the plaintiffs in parting with the registration book, but, adopting the test laid down by Blackburn J. in *Swan* v. *North British Australasian Co.*[65] and accepted by the Privy Council in the *Mercantile Bank* case, he held that, in the present case, the book itself not being a document of title, the plaintiffs were "not in breach of any duty owing to the general public any more than the man who leaves his house unlocked so that a thief walks in and steals his silver." Hodson L.J. then considered the case on the alternative basis, "not on a consideration of negligence, but on what is the nature of the representation made by the delivery of the registration book."[66] He went on to say, "The case is entirely different where, as in *Henderson and Co.* v. *Williams*[67] in the words of Lord Halsbury [at page 525]: 'There may be a question where, although no property had in fact passed, yet the true owner has allowed another person to hold himself out as the owner in such a way as to make an innocent purchaser enter into a contract, which contract being performed cannot be set aside.'" Hodson L.J. also referred to *Abigail* v. *Lapin*[68] where the Privy Council accepted the view of the minority of the High Court of Australia expressed in the following passage: "In our opinion, the Lapins are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages to other persons and they ought to be postponed to the equitable rights of Abigail . . ." *Rimmer* v. *Webster*[69] is another example—"Where the owner is

[62] My italics.
[63] [1956] 3 All E.R. 905.
[64] *Ibid.*, at p. 914.
[65] 2 H. & C. 275 at 182.
[66] [1956] 3 All E.R. 905 at p. 915.
[67] [1895] 1 Q.B. 521.
[68] [1934] A.C. 491 at pp. 499, 500.
[69] [1902] 2 Ch. 163 at 173, approved in *Tang Chien* v. *Li Pa Kwai* [1932] A.C. 715 and also in *Abigail* v. *Lapin* [1934] A.C. 491.

found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee" (Farwell L.J.). Applying these principles to the case in hand, Hodson L.J. (with whom Morris L.J. agreed, Denning L.J. dissenting) came to the conclusion that the delivery of a motor-car together with its registration book to a third party did not amount to a representation of ostensible ownership which would raise an estoppel against the true owner. The significant fact, however, is that the plea of estoppel based on ostensible ownership was considered without reference to the element of duty.

In the *Mercantile Bank* case Lord Wright cited *Henderson and Co.* v. *Williams* and *Fuller* v. *Glynn, Mills, Currie and Co.*, both of which he was content to distinguish on the facts, without reference to the non-existence of a duty in either of them, while he did not refer to *Abigail* v. *Lapin* where the judgment of the Privy Council was delivered by Lord Wright himself, who made no mention of any duty on the part of Lapin. In Lord Tomlin's statement in *Greenwood* v. *Martins Bank* [70]—widely quoted as the classic statement of the basis of estoppel—the only mention of breach of duty as an element of estoppel is in one class of case, *viz.*, silence when there was a duty to correct another's mistake. The text writers, too, do not seem to have accepted Lord Wright's view.[71] It is a question, therefore, whether Lord Wright's statement that "the existence of a duty is essential even if the case were put on representation or holding out" is a correct expression of the law on the point. But if a duty is required even where the estoppel is based on representation, then, as we have argued in the preceding pages, the maker of a note should be held to be under a duty to withdraw it from circulation after it has been paid. Assuming, however, that a duty is not required the argument founded on ostensible ownership would proceed along the following lines:

"A note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note bona fide, not by virtue of any assignment of the promise but by an original, and direct, promise, moving from the maker to the bearer." [72] It is not that the transferee does not acquire title to the note "by virtue of any assignment" of it; but that having so acquired it, the promise that he sues upon is one directly with himself. That is to say, he does not allege that the maker promised the payee that he would pay

[70] [1933] A.C. 51 at 57.
[71] See Phipson on *Evidence* (9th ed.), p. 707; Nokes on *Evidence* (2nd ed.), p. 213; Halsbury's *Laws of England* (3rd ed.), Vol. 15, pp. 235, 243.
[72] *Per* Story J. in *Bullard* v. *Bell* (1817) Mason 243 (an American case).

a third person, *i.e.*, an indorsee; but that the promise was to the transferee, although at the time of the promise he was an unascertained person. As Page-Wood L.J. said with reference to negotiable bonds: "Where there is a distinct promise held out by a company, informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own." [73] In other words, although there may be equities, the company is estopped from setting them up. It issued bonds redeemable to bearer; it was aware that the bonds, being ambulatory,[74] would probably be transferred to third parties; it might have placed on the face of the bonds notice of the equities; it enabled the original holder to deceive innocent purchasers, and it is consequently estopped from setting up its equities. Now when a note is paid or otherwise discharged the life goes out of it and it is reduced to mere "waste paper" in the *hands of the payee* who loses the title to it. The payee cannot, therefore, give to a bona fide purchaser what he himself has not got. *Nemo dat quod non habet* is then true—universally true; but its truth in no way prevents an owner of property from being estopped by his conduct from setting up his good title as against a transferee who has none. This is the point. And it applies as well to negotiable instruments as to all other sorts of property,[75] with this important qualification: possession of goods is usually no indication of ownership of them,[76] but "the title of the holder of a bill is stamped on the bill itself." [77] A holder of a bill, then, *appears* to be the owner of it, while there is no such appearance in the case of goods. The law of estoppel by ostensible ownership of goods is well known, and may shortly be stated to be that if an owner permit another to appear to be the owner, he will be estopped as against persons dealing with that other.[78] And the rule includes, of course, ambulatory instruments; the only distinction between them and goods being as to the circumstances which constitute appearance of ownership. In the case of ambulatory documents mere possession of them is enough; while as to goods there must be something more. But in both cases alike, the true owner must avoid the appearance of ownership in another. And, therefore, the maker of a promissory note payable on demand which has been discharged by payment, must, if he wish to be safe, get it back from the possession of the payee.

As we have already pointed out the indorser of a discharged promissory note is precluded by section 55 (2) (*c*) of the Bills of

[73] *Re General Estates Co.* (1868) L.R. 3 Ch. 758 at p. 762.

[74] The term used by Dr. Ewart to describe instruments which are intended to be assignable free from equities. For an illuminating discussion of negotiability and estoppel see his article in (1900) 16 L.Q.R. 135.

[75] As to unauthorised transfers of title deeds see *Perry-Herrick* v. *Attwood* (1857) 27 L.J.Ch. 121; *Brocklesby* v. *Temperance Building Society* [1895] A.C. 173.

[76] *Mercantile Bank Case* [1938] 1 All E.R. 52 at 61; *Central Newbury Car Auctions, Ltd., etc.* [1956] 3 All E.R. 905 at 916.

[77] *Collins* v. *Martin* (1797) 1 Bos. & P. 651; *Peacock* v. *Rhodes* (1781) Doug. 636.

[78] See Spencer Bower on *Estoppel by Representation* (1935) pp. 208–212.

Exchange Act from denying to his immediate or a subsequent indorsee that the note was at the time of its indorsement a valid and subsisting one, but in the absence of a similar provision to determine the liability of the maker of the note who allows it, after payment, to remain in the hands of the payee, we have attempted to bridge the gap by applying the doctrine of estoppel.[79] The same difficulty was encountered in the working of the Uniform Negotiable Instruments Law in the United States of America, but the draftsmen of the new code—the Uniform Commercial Code, which has already been accepted by the State of Pennsylvania and should in the near future be universally applicable in the United States—have introduced a section which is designed to repair the omission. Section 3–602 of the Uniform Commercial Code declares quite simply that "no discharge of any party provided by this article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument." In their commentary on the Uniform Commercial Code, Professors Sutherland, Braucher and Wilcox explain that "the section is intended to remove an uncertainty as to which the original Act, *i.e.*, the Uniform Negotiable Instruments Law, is silent. It rests on the principle that any discharge of a party provided under any section of this article is a personal defence of the party, which is cut off when a subsequent holder in due course takes the instrument without notice of the defence. Thus where an instrument is paid without surrender such a subsequent purchase cuts off the defence."[80] The incorporation of a similar provision in the Bills of Exchange Act would bring clarity and certainty to an important branch of the law, for the result which is now achieved by the rules of estoppel should be achieved by the Act itself. It is hoped that the legislature, profiting by the experience of the American courts, will make the necessary change—in due course.[81]

L. Kadirgamar.*

[79] s. 97 (2) of the Act preserves the general rules of law relating to estoppels. See *Smith* v. *Prosser* [1907] 2 K.B. at p. 746, C.A.

[80] See *Commercial Transactions* (Text—Forms—Statutes) by Braucher, Sutherland and Wilcox (1953) p. 418. I am indebted to Professor Lawson, Professor of Comparative Law, Oxford University, for this reference to American law.

[81] In *Mohamedally* v. *Misso* (a judgment of the Privy Council on appeal from the Supreme Court of Ceylon, reported in 58 (Ceylon) New Law Reports 457) A gave B a promissory note payable on demand to secure the loan of a large sum of money and later executed a mortgage in favour of B, but allowed the note to remain in the hands of B, who negotiated it for value to C., a holder in due course. In an action brought by C against A, the maker of the note, the Judicial Committee agreed with the Supreme Court of Ceylon that the mortgage was a collateral security which did not operate as a discharge of the note, and, therefore, found it unnecessary to consider the alternative submission that even if the note was discharged as between the maker and the payee the maker was estopped from denying its validity against a holder in due course. See, however, the interesting judgment of the Supreme Court of Ceylon reported in 56 New Law Reports 370. The Ceylon Bills of Exchange Ordinance (No. 25 of 1927) is a verbatim reproduction of the English Bills of Exchange Act.

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# SOME BASIC PRINCIPLES OF HUNGARIAN CRIMINAL LAW

## I. Origin of the New Criminal Law

Prior to the Soviet régime's assumption of power, the development of Hungarian criminal law followed, by and large, a similar course to that followed in other European countries.

As in other systems, ancient Hungarian criminal law was based on the notion of private vengeance. Apart from a few crimes avenged by common force, criminal acts were matters of private concern; punishment was merely retribution exacted by the victim. Around the year 1000, with the establishment of the kingdom, criminal law began to be regarded as a matter of public law. But blood feuds and compositions were still to be found in the fifteenth century. Although the character of public law gradually increased in strength, the law was still far from certain. As early as the end of the eighteenth century public opinion, aware of this deficiency, began to press for codification. None of the contemporary recommendations were, however, brought into force.[1]

Changes in the attitude towards the criminal law throughout Europe in the nineteenth century showed their effect also in Hungary. Following renewed serious recommendations, the Hungarian Code of Criminal Law saw the light of day as Act No. V of 1878. After its coming into force, it underwent repeated amendment and extension; none the less, it was, for many decades, the firm foundation of the Hungarian administration of justice. Its birth was strongly influenced by foreign legislation; indeed, parts of foreign statutes (mostly German and Belgian) were incorporated almost verbatim.[2] None the less, it was progressive compared with contemporaneous Codes.

Realising the need for reform, supplementary statutes were successfully incorporated into the framework of the Code. Matters thus introduced included, *inter alia*, a special criminal procedure applicable to juvenile delinquents which was enacted at about the same time as the corresponding English statute, and juvenile courts [3]; probation and binding over [4]; rules dealing with vagrants and corrective institutions [5]; a law dealing with the responsibility

[1] J. E. Réti, *First Attempts at the Codification of Criminal Law in Hungary* (Budapest, 1928, in Hungarian).
[2] Pál Angyal, *Textbook of Hungarian Criminal Law* (Budapest, 1920, in Hungarian), p. 37.
[3] Act No. XXXVI of 1908, and Act No. VII of 1913.
[4] Act No. XXXVI of 1908.
[5] Act No. XXI of 1913.

of the Press[6]; stronger safeguards of personal reputation[7]; increased protection of the State and of social order[8]; and restraint of unfair business competition.[9]

In the meantime the idea of revising the whole Code was launched, and immediately following the end of the Second World War the work on the Code began covering the whole field of criminal law. The Supervisory Board of Juvenile Delinquents was re-formed and charged with the task of seeing that procedures applicable to juveniles should follow modern Western concepts of criminology. A Prison Commission was set up to look after prisoners and their after-care. A statute was passed, *inter alia*, providing for compulsory aid to victims, and another one for protective detention of mentally ill criminals.[10]

At this period research work of a criminological nature was commenced by several persons. With the support of the Ministry of Justice the present author was enabled to commence research by conducting 1,500 criminal-sociological investigations into the causes of habitual criminals' crimes. The suggestion was made to set up an Institute of Criminology, which was to assist the development of criminal law by criminal-sociological and criminal-psychological research.[11] The ground was fertile to receive the criminological seed, and the criminal law appeared to be willing. It was recognised, indeed, that neither the criminal nor the crime is capable of being understood unless we investigate and consider the reasons and causes of those kinds of human behaviour which the State regards as punishable. In my view, an understanding of the causes of crime even in case of the *tout comprendre* cannot unconditionally lead to the *tout pardonner*; yet, it will undoubtedly have a bearing on the degree of society's disapproval of the individual. During this very brief period of development of Hungarian criminal law there was a definite tendency to accept the concept that criminology and criminal law must necessarily meet in their essential approach to crime.[12]

In 1945 the Minister of Justice appointed a Committee of experts to prepare a new draft Code of Criminal Law.[13] The Committee promptly commenced work; the present author was himself in charge of several sections of it. It was meant to be a modern

6 Act No. XIV of 1914.
7 Act No. XLI of 1914.
8 Act No. III of 1921.
9 Act No. V of 1923.
10 Act No. XLVIII of 1948.
11 Stephen Schafer, *Tasks of the Criminal-Psychology in Criminal Justice* (Budapest, 1947, in Hungarian), p. 12.
12 Such sociological or psychological explanations of crime as do not conform with the relevant legal definition are rather worthless to both the sociologist and the psychologist. At the same time, the criminal law cannot go on using definitions which leave the sociological, psychological or biological background of a crime out of account.
13 Decree No. 61000.I.M. of 1946.

Code, designed to meet the requirements of the civilised world. Barely two years later, however, all such work had to be discontinued to make way for the implementation of new principles.

Between 1947 and 1950 Soviet pressure on all aspects of Hungarian life increased—gradually at first, though eventually completing the process with signal success. Criminal law—avowedly one of the most important weapons for upholding the Soviet régime—was, not unnaturally, also subjected to Soviet ideas. It was these that came to direct the content of criminal law, principles of ethics and results of criminology being exchanged for political expediency. The only new Hungarian textbook of criminal law,[14] which has been made compulsory reading for law students, proudly announces that Hungarian criminal law "has worked out its own system based on the experience of the leading Soviet legal science and on the exemplary results of the Soviet legal practice"; and that it has drawn on the Soviet precedents and system "not only in order to obtain assistance therefrom, but as an example to be followed." [15]

Viewed in the light of the new ideas, pre-existing Hungarian criminal law was merely a combination of the various criminal laws of the capitalist West and did not serve the spirit of a socialist State. It was further said that the aims of Hungarian criminal law, like those of all bourgeois legal systems, were that it should be "a ruthless tool of terror to be used against the working class." It thus became necessary to discard past achievements and to create a criminal law cleansed of all "reactionary" provisions, "pointed to the saboteurs, spies, Fascists and imperialists." [16] Pressure was also brought to bear by the new Hungarian Constitution, which provided that the courts' task was to punish the enemies of the people, to defend and secure the economic, social, and State order and institutions of the People's Democracy, and to teach the people the rules of socialist conduct and living together.[17] In law-making, Western principles were completely replaced by the repressive principles of Soviet criminal law. Hungary emerged not with a modern criminal code, but with a criminal law which is a faithful and representative model of the theory of Soviet criminal law and of the legal practice imposed on the satellites. A third victor emerged from the struggle between classical objectivism and modern subjectivism, and this was political expediency.

This, then, was the background of Act No. II of 1950, a Code containing the general rules of criminal law. Numerous minor modifications and additions have since been made to it in the light of day-to-day political needs. The Code, and all its subsequent modifications and additions, rejects the modern Western concept of

[14] Miklós Kádár, *Hungarian Criminal Law* (Budapest, 1953, in Hungarian).
[15] Kádár, *op. cit.*, Preface.
[16] Kádár, *op. cit.*, p. 92.
[17] Constitution of the Hungarian People's Republic, Clause 41/1.

crime. It refuses to accept any assistance from modern criminology; subservience to political requirements steps into its place as the guiding principle. Any research that attempts to find the cause of crime in the individual make-up of the criminal, whether due to his psychological or anthropological attributes or social environment, is regarded as fundamentally misconceived—matters such as these being regarded as opposed to the sociological doctrine of the Soviet régime. Even the mere existence of criminology cannot be tolerated. Completely conforming with the demands of Soviet criminal law, the cause of crime today is to be found exclusively in the capitalistic environment and the remnants of the bourgeois way of thinking. Soviet criminal law as well as the Hungarian Code is based on the assumption that this fundamental cause of crime will disappear in a socialist society and that the new social order, modelled on the Soviet system, will lead to the complete absence of crime. Accordingly, so it is said, there is only a temporary need for criminal law; and that is only because the subconscious remnants of capitalism still lure into crime the vacillating individual whose re-education is as yet incomplete. Apart from such contingencies crimes are committed only by spies and hostile agents of foreign imperialist Powers.[18]

## II. The Element of Social Danger

This is the *leitmotif* throughout the new Criminal Code. It is the Code's aim to safeguard society against activities "socially dangerous" to itself.[19] As in Western society, so in the Soviet system criminal law appears to be an instrument in the struggle against crime. However, the concept of crime is permeated by the element of "social danger." Herein lies that peculiarity which distinguishes Hungarian criminal law (and that of the Soviet Union and of the so-called People's Democracies) on the one hand from the concept and structure of criminal law of the Western World on the other.

It is worth noting that the basic concept of social danger is not an invention of the Soviet or Hungarian draftsmen of criminal law. "Social danger," "public danger," or some similar terms have been widely used by some of modern criminologists. Indeed, their application to a greater or lesser extent is, perhaps, the foundation of the whole structure of modern European criminology. The Soviet régime, however, has shown a great preference for subverting of terms which, in the West, have an accepted meaning in relation to criminal law, no less than in every other sphere of life.

The Soviet concept of social danger is a peculiar mixture of the criminological view and of the understanding of the classical criminal law. For, when political demands call for the flexibility

[18] Kádár, *op. cit.*, pp. 110–111.
[19] Act No. II of 1950, s. 1.

of terms, the criminal law of the Soviet system points to the flexible achievements of modern criminology. When, however, the need for judicial sentencing and for the treatment of offenders arises, the harshest repressive principles of the classical criminal law are applied.

Similarly, understanding of crime by the new Hungarian socialist criminal law has undergone a radical change. A crime is not explained by the letter of the law; calling in aid methods of the so-called dialectical materialism, a crime is weighed by its "social content." In the Soviet Union, as also in Hungary, the interpretation of this social content means the understanding of crime [20]; the Soviet régime has sought on that basis to create a system of law which conforms to reason.[21] By Hungarian criminal law, those acts or omissions which prevent, obstruct, or delay the building of socialism are deemed to be crimes by reason of their inherent "social danger."

Seen from that angle, it is obviously expedient and no more than reasonable to define social danger, an essential ingredient of every crime, obscurely and loosely. According to the Soviet Criminal Code "Every act or omission which is directed against the Soviet system or which trespasses on the temporary legal order established by the worker-peasant power to lead to a Communist State is socially dangerous." [22] In essence, this definition does not differ from that of the Hungarian Criminal Code, whereby "Every act or omission is socially dangerous which infringes or endangers the State, social, or economic order of the Hungarian People's Republic, or the persons or rights of its citizens." [23] In practice how far and in what respect any act or omission infringes or endangers these socialist interests is judicially interpreted and decided by the courts who, in turn, follow the directives of the Party.

Soviet jurisprudence says in effect that information concerning the social danger inherent in an act, or concerning the extent of such danger, is derived not from the statute book, but from some other, unspecified, source.[24] Hungarian criminal law also expects people to derive this knowledge from their so-called "social existence." Knowledge of this social existence, in turn, means the constant awareness by the individual of the constantly changing views of the Party. Thus, in practice, judicial investigation of the social content of a crime, *i.e.*, the finding of social danger, is merely the comparison of a person's behaviour with the Party's programme or views of the day. Should there be a divergence, the court will have no difficulty in finding that the given act or omission was a crime.

[20] V. D. Menishagin, A. A. Gherzenzon, M. M. Isajev, A. A. Pijontovskij, B. S. Uthievskij, *Soviet Criminal Law, Textbook for Universities* (1951), p. 188.
[21] Harold J. Berman, *Justice in Russia* (Cambridge, Mass., 1950), p. 285.
[22] Soviet Criminal Code, s. 6.
[23] Act No. II of 1950, s. 1 (2).
[24] Kádár, *op. cit.*, p. 184.

It goes without saying that these circumstances have created considerable legal uncertainty. For not everybody is able to follow and understand the almost daily changing views of the Party. Fewer still are in a position to appreciate the type of behaviour which, in the Party's view, merits punishment. Moreover, frequently the Party does not even enable persons to familiarise themselves with its views in good time, as very often these are revealed not *ex nunc*, but *ex tunc*. And it is this uncertainty which makes criminal law that convenient weapon in the hands of the régime which enables those in power to realise their aims. As in the Soviet Union, also in Hungary, this is the solution found to overcome the régime's fears that it might not be able to anticipate all the wiles of the forces ranged against it.[25] This uncertainty, of course, creates extraordinary difficulties for people who try to keep within the law, and practically no one is immune from the constant danger of prosecution. Non-criminal behaviour, which enables a man to avoid the risk of prosecution, depends neither upon his power of ethical discernment, nor upon the facts of his case.

All these have put difficulties also in the judges' way, and therefore even before the coming into force of the Code, a Special Council of the Supreme Court was set up and charged with the task of supplying the courts, whenever the Council saw fit to do so, with general instructions as to the political direction which the court's judgments were required to take. The Council may issue directives and pronounce decisions of principle; these are binding on all the courts. The Council consists of seven members who, so as to ensure that their directives and decisions shall always meet the Party's requirements, are appointed from among the most reliable members of the Party; particular care is taken to ensure the utmost reliability in the choice of the Council's chairman.[26] Later on, the supervision of the courts was felt to require more stringent safeguards. Accordingly, the Attorney-General of the Hungarian People's Republic was entrusted with the task of additional control. He exercises this control by a procedural step known as " legal protest " whereby he is empowered to supervise every activity of the courts and to reverse any decision of any Hungarian court.[27] Finality of judgments has thus, in practice, disappeared from criminal proceedings.

The Attorney-General's office is a political appointment; he is a member of the leading group of the Party and his appointment requires no legal qualifications. Consequently he is deemed to be a fit person adequately to represent the views of the Party prevailing at any given moment; he does this under the legal cloak of reversing the courts' judgments whenever he thinks necessary.

[25] John N. Hazard, *Law and Social Change in the U.S.S.R.* (London, 1950), p. 106.
[26] Decree Law No 9 of 1949, s. 5; Decree No. 4338/1949/6.Dec./M.T.
[27] Constitution of the Hungarian People's Republic, Clause 42.

## III. Some Characteristic Provisions of the Criminal Code

The notion of social danger, coupled with official supervision of the judgments, guarantees that the administration of justice conforms to the day-to-day political requirements. As we have seen, Hungarian criminal law is based on the principles of Soviet criminal law. The purpose of the Soviet legal system is not to " do justice " in an abstract sense,[28] but to serve the law in the Soviet sense. " The bellicose Bolshevik Party mind must be embodied in the criminal law too." [29] This is achieved not only through the practice of the courts; it is greatly assisted by the drafting of the Code which, in addition to providing for the notion of social danger, contains a number of flexible and loose provisions designed to enable a large number of individuals to be prosecuted for a large number of different types of behaviour. We find this deliberately loose terminology both in the Code containing general provisions and in the various statutes laying down certain specified offences. A few characteristic illustrations from the General Part of the Code will make this clearer.[30]

### (*a*) *The operation of the Code in regard to persons*

Hungarian criminal law expects every person, irrespective of age, to understand the " social content " of human behaviour. Yet the Code provides that persons under the age of 12 shall not be punished.[31] Soon after the coming into force of the Code, however, an amending Decree was passed, whereby appropriate measures may be taken against any person even under 12 who commits a criminal offence.[32] Under the Constitution,[33] in theory at any rate, such appropriate measures may only be of a protective character; for the Constitution provides that every endeavour shall be made to bring about the proper development of children and young persons.

As from the age of 12, criminal responsibility is almost undiminished. But prior to their eighteenth birthday children and young persons may neither be sentenced to death nor to life imprisonment. Soviet criminal law differentiates between the criminal responsibility of juveniles and adults to an even lesser extent and, in general, expects everybody to understand the social content of his own behaviour. According to the official textbook of Hungarian criminal law,[34] which is the only textbook allowed, the development of Hungarian youth is, necessarily, at a less advanced stage than that of Soviet youth, and that is why the said allowances are still made to juveniles by the Hungarian legal system.

[28] Berman, *op. cit.*, p. 219.
[29] Menishagin and others, *op. cit.*, p. 10.
[30] At the present time only the General Part of the Code has been published.
[31] Act No. II of 1950, s. 9.
[32] Decree No. 34 of 1951.
[33] Constitution of the Hugarian People's Republic, Clause 52.
[34] Kádár, *op. cit.*, p. 174.

By Hungarian criminal law everybody is presumed to understand the social content of his behaviour in the light of the Party's view; this includes every person, irrespective of nationality, who comes into contact with Hungarian affairs. The principle that the State is entitled to defend itself has far-reaching consequences: it means that Hungarian criminal law will be applicable, irrespective of the nationality of the doer, or of the country where the act was done, or even of the fact that the act may not even be a crime in other countries.

A crime committed by a Hungarian national is punishable by Hungarian criminal law, no matter whether it was committed in Hungary or abroad, and even if the act is not regarded as a criminal offence in the place where it was committed. The rule applies even to foreign nationals who became Hungarian nationals only after the commission of the alleged offence.[35] Furthermore, a crime committed by a foreigner in a foreign country is also punishable by Hungarian criminal law if the act complained of offends against the so-called basic interests of the Hungarian State or economic order, irrespective of the *lex loci delicti*.[36] A British subject, for example, who in London does an act which ranks as a crime neither under English law nor under any other law, may yet be convicted in Hungary if the act is one which, measured by the Hungarian notion of "social content," is deemed to be an offence against the basic interests of the Hungarian social order. Cases such as these are adjudged by the Minister of Justice, as they require extraordinary considerations which are deemed to be wholly beyond the powers of the ordinary courts.[37]

(*b*) *The mental element in criminal behaviour*

"Intention" under the Code covers a far wider field than is attributed to this term by either common parlance or the legal systems of the West. According to Hungarian criminal law a crime is committed intentionally if the doer either desires to bring about or abides by the consequences of his act.[38] Over and above this, however, the Code regards recklessness or negligence as a sign of guilt,[39] because it expects from the doer of the act that he should appreciate its consequences. Criminal responsibility occasioned by the offender's negligence is not excluded by contributory negligence on the part of the victim. Indeed, the offender is responsible for his own negligent act even if the socially dangerous result would not have come about but for the negligence of the victim.[40]

35 Supreme Court of Hungary, 11820/1950/12.
36 Act No. II of 1950, s. 4/b.
37 Kádár, *op. cit.*, p. 134.
38 Act No. II of 1950, s. 12/1.
39 Kádár, *op. cit.*, p. 182. (Hungarian law does not recognise the distinction between recklessness and negligence which has been drawn in English criminal law.)
40 Decision of Principle, Supreme Court, Hungarian Official Gazette No. 4 of 1952.

Hungarian criminal science explains [41] this unusually wide range of criminal responsibility by pointing out that the individual's responsibility for his own acts must increase. The socialist State's claims against the individual increase simultaneously.

(*c*) *Attempts and acts of preparation*

Almost every phase of an act is subject to criminal punishment under the Code. Not only the completed crime is punishable, but also an attempt thereat and frequently even a behaviour preparatory thereto. Punishment of an attempt is usually the same as that for the completed crime,[42] and there is room for leniency in exceptional circumstances only. The fact that no distinction can be drawn between a completed crime and an attempt is also due to the concept of social danger. The explanation [43] is the goal of the Code: the protection of socialist society; and from the point of view of danger to society ("social danger"), an attempt is no less dangerous than the accomplished crime. According to Soviet criminal law,[44] the legal basis of responsibility for an attempted crime does not differ from that of a completed crime, because "this legal basis is none other than the social danger inherent in the act committed by the criminal, seen from the point of view of the socialist legal order."

Not every preparatory act is punishable under the Code; but the flexible definition of "preparatory acts" opens the road to protect society against ever-increasing types of dangerous preparations.

(*d*) *Parties to a crime*

In establishing the criterion as to who are deemed to be the parties to a crime, the Code again lays stress on the notion of social danger. Hungarian criminal law recognises an unusually wide range of parties, in that it distinguishes between the principal or actual offender, the person who aids and abets, the instigator, the organiser of the crime, members of an organised gang, members of a conspiracy, members of a criminal group, an accessory after the fact, and a person who fails to report a crime.

The principal is that person who, in whole or in part, commits the crime.[45] In this definition, there appears the same lack of difference whether the offence be attempted or accomplished, as we have seen in relation to attempts. Under the Code, a person who accomplishes a crime merely in part is also deemed to be a principal.

The position of the instigator and the accomplice on the one hand and that of the principal on the other differs in theory only. Under the Code the former are subject to the same punishment as the latter. The instigator is the person who intentionally induces

[41] Kádár, *op. cit.*, p. 189.
[42] Act No. II of 1950, s. 18.
[43] Kádár, *op, cit.*, p. 215.
[44] Menishagin and others, *op. cit.*, p. 305.
[45] Act No. II of 1950, s. 20/1.

another to commit a crime. The aider and abettor is that person who assists another in committing a crime.[46] The previous Hungarian Criminal Code imposed lighter punishment on the accomplice than on the principal. Again, today, considerations based on social danger account for equal punishment. Notwithstanding the statutory provision, the courts have a discretion to impose a heavier punishment on the principal than on those who assist him. Judicial discretion is exercised in this manner particularly when, for example, the principal is a so-called "class alien," while the accomplice is a faithful supporter of the socialist social order.[47] Here again, the Soviet-type criminal law differs from the legal systems of the West, where the political views or the class-origin of the accused are wholly irrelevant matters in the consideration of his guilt. A so-called organiser of crime, *i.e.*, the person who organises or leads the conspiracy or plans or directs the crime, is also treated on the same footing as the accomplice.

As stated above there are peculiar forms of participation in crime, such as belonging to a conspiracy, to an organised gang or a criminal group. These are in reality collective preparations for crime, and as such are punishable pursuant to the rules concerned with the acts preparatory to a crime in general.[48] A "gang" denotes a number of individuals who agree jointly to commit one or more series of unspecified crimes. A "conspiracy" consists of an agreement by two or more individuals to commit one agreed specified crime. A "group" differs from a gang in that in the former the criminal act so closely follows the agreement that there is no time for premeditation. In certain cases punishment imposed on members of a gang or a group or conspiracy may be more severe than that which might have been imposed on individuals had they committed the crime by themselves; but the punishment will in any event depend upon the degree and extent of social danger. Damage to State-owned property will be regarded as an aggravating circumstance.[49]

Exceptionally, the position of the accessory after the fact is still governed by the rules of the previous Hungarian criminal law.[50] According to those, the accessory after the fact is the person who, without having previously agreed with the principal, assists the latter or his accomplice to escape arrest, to evade justice, or to remain unpunished. Those who collaborate in order to secure for themselves a share in the fruits of the crime are also regarded as accessories.

The principle of social danger has in many cases necessitated the punishment of those who are guilty of failure to lay an information against a criminal or to report a criminal activity; particularly when the crime concerned is directed either to bringing about the

[46] Act No. II of 1950, s. 20/2 and 20/3.
[47] Kádár, *op. cit.*, p. 222.
[48] Act No. II of 1950, s. 19.
[49] Decree Law No. 24 of 1950.
[50] Act No. V of 1878, ss. 374–375.

overthrow of the State order or is a crime against State-owned property.[51] The duty to inform covers three distinct matters: the preparation of an actual crime, an actual crime already committed, and suspicious behaviour in general. The first two apply to certain statutory crimes. The difference between them is theoretical only, the punishment for breach of the duty being the same: it is commensurate with the actual crime concerned. The reason behind the duty to inform on the above two stages of crime lies in the concept that every citizen of a socialist State is in moral (and therefore legal) duty bound to safeguard his State against socially dangerous activities, also in this way.

Generally speaking, the principle that such a wide range of participants in a crime shall be penalised has its roots in the peculiar theory of Communist criminal law. The notion of social danger ensures that criminal law shall not only concern itself with a wide range of types of behaviour, but also with a wide range of persons who, in one way or another, engage in criminal activities. The third type of crime in respect of which there is a duty to inform serves this purpose even better; this duty to inform is known as "people's control."[52] The statute provides that any person may be ordered by the competent authorities generally to watch whether anyone behaves in a manner prejudicial to the socialist order. Such "controllers" are then in duty bound to inform on any suspicious activity; failure to inform is a criminal offence and renders the controller liable to punishment. An attempt to interfere with the controller's work is also punishable. On the other hand, should any information laid by a controller prove to be unfounded, he will be immune from a charge of defamation in reliance on State protection afforded to him by the Act.

The above rules, together with those referred to in the earlier part of this brief survey, show that in the Soviet Union, under whose influence the new Hungarian criminal law was born, the old technique of criminal law still prevails.[53] Hungarian criminal law, the faithful and model apprentice of its Soviet master, has reverted to a state similar to that existing in a long past epoch of the criminal law when punishment was not based on criminological ideas and was only the measure of political vengeance and the force of power. Behind the Iron Curtain the means of criminal justice must always be guided by the interests of the proletarian dictatorship.[54] As the Soviet authorities have repeatedly declared: the task of criminal law is determined exclusively by the aims and functions of the State based on the Soviet system, and by nothing else.

Stephen Schafer.*

[51] Act No. VII of 1946, and Decree Law No. 24 of 1950.
[52] Act No. VI of 1957.
[53] Hans Kelsen: *The Communist Theory of Law* (London, 1955), p. 103.
[54] F. Münnich, Hungarian Prime Minister: *Address to the National General Meeting of Judges* (*Népszabadság*, Budapest, February 23, 1958).

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# STATUTES

## Maintenance Orders Act, 1958

(1) The Maintenance Orders Act, 1958, is one of those statutes which deal with enforcement procedure, but the potential effect of which in the shaping of the law in practice may be greater than that of many changes in substantive principles. No attempt will be made here to review the procedural details of a statute which is inevitably of a highly technical character. But the enforcement of maintenance orders, whether made by the High Court or by a magistrates' court or (under the Guardianship of Infants Acts [1]) by a county court, raises points of principle, and the Act introduces at least four measures of reform which are fundamental: (a) Through the registration mechanism laid down in Part I, High Court and county court orders are made enforceable in the magistrates' court, and magisterial orders in the High Court. This is discussed below under (2). (b) Part II brings English law into line with the law of Scotland and with that of many other countries by making maintenance orders enforceable through the attachment of claims to "earnings," *i.e.*, wages, salary and other emoluments payable under a contract of service, as well as pensions and similar payments.[2] This is discussed below under (3). (c) In Part III the irrational rule is abolished by which the imprisonment of the defendant under a magisterial warrant of commitment wipes out the arrears of maintenance for which he is committed.[3] (d) In Part III steps have also been taken to restrict imprisonment for debt by providing that normally a debtor will not be committed where his earnings can be attached,[4] that imprisonment may not exceed six weeks,[5] and that normally no debtor can be committed more than

[1] Guardianship and Maintenance of Infants Act, 1951, s. 1.

[2] For details see s. 21 (1) of the Act. It includes fees, bonus, commission, overtime pay, and pensions and annuities whether or not the person paying the annuity was the recipient of the services. It also includes periodical payments by way of compensation for loss of office, etc. But it does not include payments by public departments of governments outside "the United Kingdom or of Northern Ireland" pay or allowances payable to members of H.M. Forces, national insurance benefit of any kind, or disablement or disability pensions. Nor does it include payments to seamen or apprentices to the sea service, presumably because, like the armed forces, they are covered by other statutory provisions for deduction from pay in respect of maintenance orders. See Report of the Royal Commission on Marriage and Divorce, Cmd. 9678, p. 283, note 33.

[3] s. 74 (8) of the Magistrates' Courts Act, 1952, as amended by s. 16 (1) of the present Act. This is based on Recommendation 129 of the Royal Commission (see para. 1108 of the Report). The provision has retrospective effect within the limits laid down in s. 16 (2).

[4] s. 74 (6) (*a*) of the 1952 Act, as amended by s. 16 (1) of the present Act.

[5] s. 74 (7) of the 1952 Act, as amended by s. 16 (1) of the present Act, and retrospective within the limits of s. 16 (2).

once in respect of the same arrears.[6] The detailed further procedural reforms inaugurated by Part III—partly based on minor but useful recommendations of the Royal Commission on Marriage and Divorce [7]—are beyond the scope of this Note.

The Act will apply to High Court orders for alimony, maintenance and periodical payments,[8] and to magisterial maintenance orders under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, as well as to orders under the Guardianship of Infants Acts.[9] It will also apply to orders for the enforcement of the liability of a father to maintain his illegitimate child, no matter whether it is the mother who is entitled to the payments,[10] or the National Assistance Board,[11] or a local authority,[12] or a " fit person " other than a local authority to whose care the child has been committed.[13] It will enure to the benefit of public welfare authorities, whether the N. A. B. itself or a local authority, when seeking through the appropriate " contribution " or other orders, to make spouses and parents liable for expenses incurred for the support of their wives, husbands, or children.[14] It will also assist in the enforcement in this country of maintenance orders made elsewhere in the United Kingdom [15] or even in the Commonwealth at large.[16]

(2) Much could be said for a radical reform by which all family maintenance claims were concentrated in one court and all possible methods of enforcement made available for the orders of that court. To ask for this is, however, like crying for the moon, and the Act provides the next best thing, which is a measure to make the orders of the various courts to some extent interchangeable for enforcement purposes.

The " mischief " which the statute seeks to remedy by making High Court and county court orders registrable and thus enforceable in the magistrates' court is set out in detail in the Report of the Royal Commission on Marriage and Divorce [17] on whose recommendations [18] this part of the statute is based. Despite the reforms in

[6] s. 17.
[7] See, *e.g.*, ss. 18 (1) and 20 (6) and Recommendations Nos. 130 and 135.
[8] Matrimonial Causes Act, 1950, ss. 19–27; see the definition in s. 21 (1) of the present Act.
[9] *i.e.*, to orders for payment to the mother under s. 3 (2) of the Guardianship of Infants Act, 1925, as well as to payments due by a father or mother to a guardian or by one guardian to another under s. 5 (4) or s. 6 of that Act.
[10] By virtue of ss. 4 and 5 of the Affiliation Proceedings Act, 1957. If the mother is dead, or of unsound mind, or in prison, the person entitled is the appointed guardian.
[11] National Assistance Act, 1948, s. 44.
[12] National Assistance Act, 1948, s. 44; Children and Young Persons Act, 1933, s. 88; Children Act, 1948, s. 26.
[13] Under the Children and Young Persons Act, 1933, s. 88, or under the Children Act, 1948, s. 26.
[14] Children and Young Persons Act, 1933, ss. 86–87, as extended and amended by ss. 23 to 25 of the Children Act, 1948; National Assistance Act, 1948, s. 43.
[15] Maintenance Orders Act, 1950, Part II.
[16] Maintenance Orders (Facilities for Enforcement) Act, 1920.
[17] Paras. 581–582.
[18] Nos. 69 and 72.

High Court procedure introduced in 1952,[19] the enforcement procedure available in the magistrates' courts continues to be more effective than that applied in the High Court. Obviously the courts of summary jurisdiction are more easily accessible and their procedure is less expensive. But what is equally important is that the payments they order are collected and the orders they make are enforced by the clerk as collecting officer,[20] and that in committal, and now in earnings attachment proceedings,[21] in the magistrates' court, the debtor must prove his inability to pay, whereas on a judgment summons in the High Court or in a county court the wife (or other creditor) must satisfy the court that the debtor has the necessary means.[22] Clearly a very valuable new remedy has been given to wives and others seeking to enforce family obligations through the provisions[23] by which High Court and county court orders can be registered and thus be made enforceable in the court of summary jurisdiction.

Not that such registration can, as the Royal Commission had suggested,[24] be ordered *ex officio*. An application must be made to the "original court," *i.e.*, to the court which has made the maintenance order,[25] and that court has a discretion in the matter.[26] As soon as the application has been granted, the enforcement of the maintenance order is suspended until either it has been registered or the time for registration has lapsed,[27] but once it is registered it can be enforced as if it had been granted by the magistrates' court.[28] It cannot then, however, be enforced in any other way, *i.e.*, not in accordance with the procedure of the court from which it emanated.[29] The power to vary the maintenance order—so important a matter in practice—is on principle transferred to the magistrates' court, but that court cannot, by varying the order, impose a liability to pay an amount higher than that ordered by the original court, unless it remains within the four corners of the magisterial jurisdiction, which, in the case of a husband's liability, goes up to £5 per week for the wife and 30s. for each child.[30] If the court feels that liability should be increased beyond these limits, it must remit the matter to the original court.[31]

The Royal Commission did not recommend that magisterial

19 Matrimonial Causes (Judgment Summons) Rules, 1952; S.I. No. 2209.
20 Magistrates' Courts Act, 1952, s. 52 (2).
21 Magistrates' Courts Act, 1952, s. 74 (6); Maintenance Orders Act, 1958, s. 6 (2).
22 See Report of the Royal Commission, para. 1090.
23 ss. 2 (1) and 3 of the present Act.
24 See paras. 583 and 584 of the Report and Recommendations 70 and 71.
25 s. 2 (1).
26 *Ibid.*: "if it thinks fit."
27 s. 2 (2).
28 s. 3 (1) and (3).
29 s. 3 (4).
30 s. 4 (3).
31 See, in general, s. 4, largely based on Recommendations 73 and 74 of the Report. For exceptions to the principle, see s. 4 (5).

orders should be registrable in the High Court, and, by abolishing the rule that arrears are discharged by committal,[32] the new Act has removed one of the incentives to get a magisterial order enforced through High Court procedure.[33] Moreover, despite the recommendation of the Royal Commission to this effect,[34] nothing has been done to remove the disincentive which consists in the (to the claimant) unfavourable burden of proof in the High Court. Nevertheless, where, *e.g.*, a husband liable for arrears of payment under a magistrates' order owns property available for execution, the wife may find it helpful that she can now ask the magistrates to order that the maintenance order be registered in the High Court.[35] She must show that at least four weekly payments or two for longer periods are in arrear, but if she does, the court must make the order: unlike the High Court or a county court in the reverse situation it has no discretion. When an application has been made the order ceases to be enforceable in the magistrates' court, and when it is registered it becomes enforceable like a High Court order,[36] but the magistrates retain the power of variation.

(3) The problem of the attachment of wages for the enforcement of maintenance orders involves a clash of two social policies: the policy to protect the wage earner by guaranteeing to him the payment of his earnings clear of deductions, and the policy to protect his family in the event of his failure to provide proper support. Few if any legal systems in the world have ever gone as far as the English Wages Attachment Abolition Act, 1870, which prohibits the attachment of the wages of any "servant, labourer or workman."[37] Neither this nor, as far as the present writer knows, any other statute deals, however, with the assignment of wage claims[38] —a topic which may hitherto have been somewhat academic, but which may gain practical importance as a result of the present Act.

In many countries the garnishment of wage and salary claims is limited where the judgment to be enforced is for an ordinary debt, but unlimited or in the discretion of the court where the creditor claims family maintenance. In this country, under the new Act, the policy of the Act of 1870 (which is very closely connected with that of the Truck Acts and similar legislation) will, of course, continue to apply to ordinary debts with which the new Act

[32] s. 16.
[33] See para. 1092 of the Report.
[34] See para. 590 and Recommendation 75.
[35] s. 2 (3). The court "shall" grant the application if the conditions are satisfied.
[36] s. 3 (1).
[37] The meaning of these words is mysterious. See, *e.g.*, *Gordon* v. *Jennings* (1882) 9 Q.B.D. 45, where a company secretary employed at a salary of £200 (in 1882) was held not to be a servant for the purposes of the Act, but the court refused to give any indication of the borderline of its application.
[38] As distinguished from civil service salaries. Legislation on civil servants' salaries, their attachment and assignment, as well as civil service and other pensions and superannuation rights is relevant in this context.

has nothing to do. But family maintenance claims will be enforceable through a new type of garnishment procedure known as the making of an "attachment of earnings order."[39] The arguments for and against this innovation are fully described in the Report of the Royal Commission[40] which, in the face of very strong opposition to the reform from both trade unions and employers, could not see its way to recommend it.[41] It is all the more gratifying that it has been introduced after all. The present writer does not believe that a procedure which, it seems, has worked north of the Tweed for a long time, will in this country justify the gloomy predictions made by some of the witnesses who gave evidence before the Fischer Williams Committee which reported in 1934[42] and before the Royal Commission.[43] One intended consequence of the reform may be a reduction of the number of men imprisoned for non-payment of maintenance arrears.

In several respects the new Act gives a wide measure of discretion to a court, *i.e.*, to the High Court, a county court or a magistrates' court, by which payments of maintenance arrears are enforceable and to which an application has been made for an attachment of earnings order.[44] In the first place, the order itself is, like a garnishee order,[45] discretionary[46]: the court makes the order "if it thinks fit." In the second place, when making the order, the court specifies, in its discretion, the "normal deduction rate," *i.e.*, the amount to be paid by the employer on each pay-day[47] to the officer designated by the court for this purpose[48] in respect of

[39] s. 6 (1). In the past such orders could be made for the enforcement of maintenance and similar claims by virtue of s. 8 (2) of the Guardianship of Infants Act, 1925, and of s. 10 of the Affiliation Proceedings Act, 1957 (which took the place of earlier provisions and which—see Summary Jurisdiction (Married Women) Act, 1895, s. 9—apparently also applied to the enforcement of orders under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949). But these provisions were in practice ineffective because "any pension or income" could be attached only if it was "capable of being attached," and in the majority of cases it was not so capable owing to the Wages Attachment Abolition Act and other legislation. See Report of the Royal Commission, para. 1097. The two provisions have now been repealed by s. 23 (4) of the present Act.

[40] Paras. 1100–1104.

[41] Paras. 1105, 1107.

[42] Cmd. 4649. See for the complex past history of the relevant proposals, committee reports, and Bills, para. 1099 of the Report of the Royal Commission on Marriage and Divorce.

[43] Paras. 1100, 1102.

[44] s. 6 (1), and s. 6 (5) which makes it clear that a county court can make an attachment of earnings order to enforce a High Court maintenance order. Where a maintenance order has been registered under Part I of the Act, the jurisdiction to make attachment of earnings orders under Part II would clearly seem to be exclusively exercisable by the court of registration, and not by the original court.

[45] Rules of the Supreme Court, Ord. 45, r. 1.

[46] s. 6 (1).

[45] Rules of the Supreme Court, Ord. 45, r. 1.

[48] s. 6 (3) (*c*): normally either a county court registrar or clerk to the magistrates' court.

current maintenance payments and of arrears and costs [49] and, of course, *pro tanto*, in discharge of the employer's own liability under the contract of employment. Thirdly the court, also in its discretion, specifies the "protected earnings rate," *i.e.*, the minimum below which the cash payments by the employer to the defendant must not be reduced as a result of the attachment of earnings order. This is the court's most delicate task because at this point it may often have to reconcile, as best it can, the legitimate interests of the defendant's present family and those of his former family The Act makes this clear by saying [50] that, in specifying the protected earnings rate, the court must have regard to the resources and needs of the defendant and to the needs of persons "for whom he must or may reasonably provide." This formula would appear to show that this compromise has to be found where after a divorce the man has remarried, but also where, after a separation or divorce, he has formed a permanent attachment without marriage.

Whereas the court is thus not, like the courts in some foreign countries, hamstrung by any narrow arithmetical formulae in fixing these vital figures, in other respects its discretion is circumscribed. No order may be made unless the defendant is in arrear with at least four weekly or two longer payments,[51] and—a matter which was in controversy in the evidence before the Royal Commission [52] —no order may be made "if it appears to the court that the failure of the defendant to make the payments . . . was not due to his wilful refusal or culpable neglect." [53] Both these restrictions are highly debatable, especially the second, but its importance may turn out to be small in practice in view of the difficulty any debtor may experience in discharging the burden of proof which the law so unmistakably places upon him.

The Act regulates the procedure in some detail [54]—the relevant provisions have of course to be read as supplementary to the general procedural codes applicable to the particular court, especially to Part II of the Magistrates' Courts Act, 1952. The position of a garnishee is always a little less than enviable, and so is that of the employer, "the person to whom an attachment of earnings order is directed," under the Act. The court makes the order if it appears to it that the defendant is a person to whom earnings fall to be paid and that the person to whom the order is directed is his employer in respect of those earnings or part thereof.[55] It seems to be clear that the order is not made *ex parte*, but after a hearing.[56] The court may, but need not,

[49] s. 6 (3) (*a*) and Schedule.
[50] s. 6 (3) (*b*).
[51] s. 6 (1) (*a*).
[52] Para. 1098.
[53] s. 6 (2).
[54] ss. 7–14 and 20.
[55] s. 6 (1).
[56] See, *e.g.*, ss. 43 *et seq.* of the Magistrates' Courts Act, 1952; see also s. 11 of the present Act.

before or at the hearing, order the defendant to give a statement with particulars to identify the employer, to specify the earnings, and to enable the employer to identify the defendant, and it may order the alleged employer to give particulars of the defendant's earnings,[57] and these statements are admissible evidence.[58] What are "earnings" may be a somewhat difficult question in a particular case, and it is laid down that the court may determine this so as to protect the employer who, in reliance on the court's determination, complies with the order.[59] The order does not take effect until seven days have expired after a service of a copy on the alleged employer,[60] and that person has then an opportunity of notifying the court if there is a mistake.[61] Subject to this he must comply with the order (or orders, for there may be two or more, which may involve some difficult calculations).[62] The law does not say *expressis verbis* that an employer who pays the defendant in disregard of the order remains liable to the collecting officer acting on behalf of the wife or other person who has obtained the order, but this may be assumed. The only sanction expressly provided for is penal.[63] Further provisions deal with the application of the statute to proceedings in the High Court or a county court under the Debtors Act, 1869, and under the Magistrates' Courts Act, 1952, with regard to maintenance orders,[64] with the relation between the new provisions and other methods of enforcement,[65] with the variation and discharge of attachment of earnings orders,[66] and with the application of the new principles to earnings paid by the Crown.[67]

An employer who makes a payment under an attachment of earnings order must give the debtor, *i.e.*, his employee or former employee, a written statement specifying the amount.[68] This, and not only this, obviously involves the employer in additional trouble and expense, and, as a compensation, he may deduct from the wage or other payments due to the debtor himself the sum of sixpence in respect of each payment under the Act, a payment in respect of two or more attachment of earnings orders counting as two or more payments for this purpose.[69] This power is given to the employer "notwithstanding anything in any other enactment," and thus is intended to operate as an exception to the principle of the Truck Act, 1831, s. 3.

O. Kahn-Freund.

[57] s. 11 (1).
[58] s. 11 (2). A document purporting to be such a statement is to be deemed to be such a statement without further proof unless the contrary is shown.
[59] s. 12.
[60] s. 6 (4).
[61] s. 10 (4).
[62] s. 10 (2) and Schedule.
[63] s. 15
[64] s. 7.
[65] s. 8.
[66] ss. 9 and 20 (3), (4).
[67] s. 14.
[68] s. 10 (3).
[69] s. 13 (3).

## The Public Records Act, 1958

This Act, which came into force on the first day of January, 1959, has had as its first object the substitution of the Lord Chancellor for the Master of the Rolls in "the direction of the Public Record Office." Thus ended an association which dated from the first Public Record Office Act of 1838. How it came about that the care of the nation's records should have been statutorily fixed upon Lord Langdale, then Master of the Rolls (who had already advised placing it elsewhere), is a curious oddity which the Royal Commission on Public Records of 1910 described as "an anomaly and the fruit of accident," and which Sir James Grigg's Committee in 1954 found to be "not entirely clear." By this Act he is relieved of most (though not all) of his connection with records, some of which were in his "custody," and others in his "charge and superintendence," under previous legislation. This distinction is only one of several which have caused difficulty in the past; another was the problem of defining "records," which is a term of different import to archivists, lawyers, historians and the public generally; still another was the feeling that "public," "local," and "private" records (or "archives") ought to be recognised as presenting different problems. The present Act gives to the Lord Chancellor the "direction of the Public Record Office" and authorises him to appoint a "Keeper of the Public Records," whose duty it will be to take charge of the Public Record Office under his direction. In this duty to execute the Act and supervise the care and preservation of public records he will have an Advisory Council on Public Records, of which the Master of the Rolls will be Chairman.

One of the most urgent needs of the Record Office was to have a Minister who could speak for it in Parliament; this the Act provides. Another consideration, and one which holds an important place in the day-to-day work of the office, is its relation with the ministries and departments which in the course of their duties manufacture mountains of records. After a time, their files will cease to be needed for current business, and it is then that the complicated and responsible procedure begins which eventually separates those destined for ultimate preservation from those which can be immediately destroyed. Those destined to be kept are then arranged and classified, so that when they eventually reach Chancery Lane a certain amount of work has already been done on them. This procedure including, as it does, the dangerous power of destruction, requires the association of officials from the Public Record Office, and the first Rules governing the procedure were made by Sir George Jessel in 1882. Under this Act the Lord Chancellor and the Keeper of Public Records will control destruction.

A general responsibility for the records of courts of record, quarter sessions, magistrates' courts and coroners' courts is given

to the Lord Chancellor, as also certain powers over wills and other documents which had been previously given to the President of the Probate Division in 1925. The difficult question of what are "public records" is dealt with in Schedule I. The Act does not affect the use of records (or authenticated copies of records in the Public Record Office) as evidence in courts of law.

T. F. T. Plucknett.

# NOTES OF CASES

## Successive Applications for Habeas Corpus

*Re Hastings* (*No.* 2),[1] the last case to be reported in the *Weekly Law Reports* for 1958, is also perhaps the oddest. The *ratio decidendi* is accurately stated in the headnote: "An applicant for a writ of habeas corpus in a criminal cause or matter, who has once been heard by a Divisional Court of the Queen's Bench Division, cannot be heard again, on a renewed application made on the same evidence and the same grounds, by another Divisional Court of the same Division, as the decision of the Divisional Court is equivalent to the decision of all the judges of the Queen's Bench Division."

At first sight it may seem remarkable that such an application should have been made at all. But there are dicta by Lord Halsbury L.C. in *Cox* v. *Hakes*[2] and a decision of the Judicial Committee of the Privy Council in *Eshugbayi Eleko* v. *Government of Nigeria*,[3] to the effect that one whose application for a writ of habeas corpus has been refused may apply not only to every superior court of competent jurisdiction but also to every High Court judge in turn; and these pronouncements have been treated as an authoritative statement of the law by every modern writer[4] with the exception of Mr. R. F. V. Heuston.[5] The applicant in the present case had been convicted on five counts and sentenced to four years' corrective training. The sentence was not expressed to be concurrent on each count. On appeal, his conviction on one count was quashed, but the sentence was not varied. He applied to a Divisional Court of the Queen's Bench Division for a writ of habeas corpus on the ground that since only one general sentence had been passed there was no longer any lawful sentence on him in being. His application was dismissed.[5a] He then appealed to the Court of Appeal, which declined jurisdiction on

[1] [1958] 3 W.L.R. 768; also reported [1958] 3 All E.R. 625.

[2] (1890) 15 App.Cas. 506 at 514; see also *Ex p. Chapple* (1950) 66 (Pt. 2) T.L.R. 932 at 936, *per* Denning L.J.

[3] [1928] A.C. 459.

[4] Short and Mellor, *Practice on the Crown Side* (2nd ed.), 320; Halsbury's *Laws of England* (3rd ed.), xi, 38–39; Griffits, *Guide to Crown Office Practice*, 113; Notes to R.S.C., Ord. 59, r. 14, in the *Annual Practice*; Holdsworth, H. E. L., ix, 122–123; Wade and Phillips, *Constitutional Law* (5th ed.), 372–373; Keith, *Constitutional Law* (8th ed.), 379; Hood Phillips, *Constitutional Law* (2nd ed.), 504–505; Lord Goddard, "A Note on Habeas Corpus" (1949) 65 L.Q.R. 30.

[5] In a learned article, "Habeas Corpus Procedure" (1950) 66 L.Q.R. 79, in which he contends that the right to make successive applications extends only to applications to different courts, and not (*except in vacation*) to different judges.

[5a] *Re Hastings* [1958] 1 W.L.R. 372.

the ground that the appeal arose in respect of a criminal cause or matter. Next, relying upon the contention that he was entitled to go to every High Court judge in turn, he made a renewed application to a Divisional Court of the Queen's Bench Division constituted of three different judges. The court, in a reserved judgment delivered by Lord Parker C.J., dismissed the application on the grounds already stated.

Although this decision is an eminently reasonable one, it leaves several awkward questions unanswered. The most difficult of these questions is the least conspicuous. Granted that prior to the Judicature Acts a writ of habeas corpus could be obtained from a common law court in term time only if the court was sitting *in banc*, and that by virtue of the Judicature Acts a Queen's Bench Divisional Court is the successor of the three common law courts sitting *in banc*, so that its decision is the equivalent of that of all the judges of the Division, it still has to be ascertained *why* an unsuccessful applicant for habeas corpus cannot approach the Divisional Court again on the same facts. The obvious answer is that the matter is *res judicata*. But this answer seems to be wrong. It was settled law before the Judicature Acts that successive applications on the same facts could be made to each superior *court* in turn, and still is settled law that in *vacation* successive applications on the same facts can be made to each High Court *judge* in turn. These rules were based not on the provisions of the Habeas Corpus Acts but (as Mr. D. M. Gordon has pointed out [6]) on the doctrine that a decision to refuse a prerogative writ did not make the matter *res judicata*. The basis of this doctrine was that because an application for a prerogative writ was not accompanied by formal pleadings, no writ of error would lie in respect of a decision refusing it, and no one was concluded by a decision that was not reviewable on a writ of error. Although the historical basis of the doctrine has long since disappeared, the rules permitting successive applications for habeas corpus (though not for the orders substituted for the other prerogative writs) survive. If it is still correct to say that a decision refusing an application for habeas corpus does not make the matter *res judicata*, the Divisional Court's refusal to entertain the second application in the present case must be justified by some other legal principle. The court in fact thought it sufficient to say that since the applicant had been heard once by the court he could not be heard again. In other words, it relied upon an inherent duty—not a mere discretionary power—to decline jurisdiction to entertain the application on its merits. The course adopted by the court is so manifestly in accord with common sense that it would be captious to criticise the decision in terms of strict logic, but the difficulty

[6] Note (1929) 7 Can.Bar Rev. at 52. See also Lord Goddard in 65 L.Q.R. at 34–35.

one experiences in discerning the origins of the duty assumed by the court [7] serves to emphasise the degree in which the law relating to habeas corpus is riddled with anomalies.

The court expressly refrained from giving a concluded opinion as to the right of an applicant to go successively from judge to judge of the same court in term time. However, it observed that the authorities, with the exception of *Eleko's* case, did not support the view that such a right existed, and that there were cogent reasons for thinking that that case went too far.[8] These observations, regarded in the light of the historical review by which they were preceded, will materially weaken the authority of *Eleko's* case, which appears to have been wrongly decided.[9]

The decision in the present case is confined to successive applications in respect of a criminal cause or matter, but there can be no doubt that it applies equally to successive applications in respect of a civil cause or matter. It is not clear what rule is to govern successive applications to Divisional Courts of different Divisions. On principle (if considerations of principle can be given any weight in this context) it would seem that such applications should not be permitted, for the three Divisions of the High Court are not separate courts. An applicant who has applied unsuccessfully in vacation to a series of individual judges (who may be of the same Division or of different Divisions) may presumably make a further application in term time, either to a Divisional Court or to a single judge under Order 59, rule 14. An application already refused by a single judge in term time cannot be renewed before a Divisional Court of the same Division unless the law as stated in *Eleko's* case is correct; and even if it is correct, *Hastings'* case now stands as authority for the proposition that the second application will exhaust the applicant's rights in that Division.

It is to be hoped that before long this hotchpotch of incongruities will be referred to the attention of the Law Reform Committee. The rule that successive applications are permissible in vacation could well be retained because of the possibility that no immediate appeal against refusal of the writ by one judge may be practicable. But it is difficult to see how anything more rational than an addiction to the sporting theory of justice can be invoked to justify the retention of successive applications in term time, at least in respect of civil matters, where appeal against a refusal of the writ is permissible. The existing doubts and anomalies should be removed by legislation prohibiting successive applications on the same facts in term time, and providing a right

[7] The only authority cited by the court in support of its view was an observation made by Parke B. in the course of argument in *Re Cobbett* (1845) 5 L.T. (o.s.) 130.

[8] The court referred with approval to the judgment of FitzGibbon J. in the Irish case of *The State* (*Dowling*) v. *Kingston* (*No.* 2) [1937] I.R. 699. This judgment is severely critical of the decision in *Eleko's* case.

[9] *Cf.* Mr. Heuston's article, note 5, *ante*.

of appeal against refusal of the writ in criminal causes or matters. The appeal might lie either to the House of Lords (as the court suggested in *Hastings'* case), or from a single judge to a Divisional Court, and from a Divisional Court acting as a court of first instance to the Court of Appeal. If the last suggestion is to be regarded as creating another anomaly one may reply that it would be only a little one.

S. A. de Smith.

## *Duncan* v. *Cammell Laird* Inviolate

The bold attempt made in *Auten* v. *Rayner* [1] to challenge the conclusiveness of an objection made by a Minister on the grounds of public interest to the production of documents in legal proceedings has served only to evoke a reaffirmation of the rule in *Duncan* v. *Cammell, Laird & Co.*[2] The plaintiff had brought an action against three defendants in which he had made serious allegations of fraud. On behalf of one defendant, a police officer, there was entered an affidavit sworn by the Home Secretary, Mr. R. A. Butler, objecting to the production of certain official police records which he had "carefully considered" and which "on the grounds of public interest . . . ought not to be produced because they belong to a class which [*sic*] it is necessary in the public interest for the proper functioning of the public service to withhold production." The Master, Ashworth J. and the Court of Appeal all held that they were bound by the decision in *Duncan* v. *Cammell, Laird & Co.* to treat this objection as conclusive.

The plaintiff's attack on the conclusiveness of the Minister's certificate took two forms. First, he contended that the right to withhold disclosure of documents was displaced in a case where a prima facie case of fraud was made out. The Court of Appeal held that such a principle (which had been laid down in relation to a claim of legal professional privilege) had no application to objections made on behalf of the Crown to the production of documents. Secondly, he contended that Mr. Butler ought not to have entered such an affidavit, inasmuch as his functions were of a judicial character, and there were grounds on which the plaintiff could reasonably suspect him of bias: one of the other defendants was remotely connected by marriage with Mr. Butler's late wife, who had been a member of the Courtauld family which had or had had an interest in companies of which that defendant was an officer, and Mr. Butler himself was a shareholder in and a former director of Courtaulds, Ltd. The Court of Appeal had no difficulty in holding that, assuming that the Minister's functions were judicial, his connection with the defendant was far too remote to create any

[1] [1958] 1 W.L.R. 1300; also reported [1958] 3 All E.R. 566.
[2] [1942] A.C. 624.

suspicion of bias. It held, further, that it was in any event Mr. Butler's public duty, as ministerial head of the department concerned, to take the personal responsibility of making the decision whether or not to object to production of the documents.

In these circumstances the question whether the Minister's functions are to be classified as judicial is academic. But it may be observed that even if the Minister is under a legal duty to acquaint himself personally with the facts of the case and then to weigh up the competing claims of the departmental interest and the interests of the administration of justice,[3] the general character of his functions is much closer to the administrative than to the judicial. Moreover, if he is bound to comply with the rule *nemo judex in causa sua* it would seem to follow that he is also bound by the rule *audi alteram partem*, so that he would be obliged to afford the opportunity of a prior hearing to those who might be prejudicially affected by a decision to object to production. Finally, the test of "reasonable suspicion of bias" is now thought to be too stringent even in relation to the exercise of functions of a strictly judicial character, and the test generally applied (except to allegations of pecuniary interest) is whether a *real likelihood* of bias exists.

Neither the decision nor the general tenor of the judgment of the Court of Appeal in *Auten* v. *Rayner* will afford solace to critics of the present law. For although Lord Evershed M.R., delivering the judgment of the court, observed (at p. 1303) that "the court is bound to look with somewhat jealous care upon any exercise of executive powers which have the effect of overriding or ousting the jurisdiction of the courts in matters which are prima facie peculiarly within their province," he went on to say that it was "of the first importance to the good order and government of the nation that those concerned in all departments of the public administration should not be embarrassed or restricted in the loyal and conscientious discharge of their duties by fear that what they may confidentially record in the course of those duties should thereafter be made public." The present law is substantially judge-made, and there seems to be little pressure from the Bench for reform. At this time of day one cannot expect the courts to take it upon themselves to draw adverse inferences from a refusal by the Crown to produce documents that are prima facie relevant, and one may even ask whether most of the judges would welcome a statutory grant of power to adjudicate independently *in camera* upon the merits of a ministerial objection. The most that can be hoped for at present is a progressive relaxation by administrative action of the classes of documents for which

[3] The court referred to Jenkins L.J.'s dicta in *Ellis* v. *Home Office* [1953] 2 Q.B. 135 at 146 on the duties of the Minister in arriving at his conclusion on the matter, but appeared to incline to the view that these dicta were merely by way of advice or admonition.

privilege from disclosure will be claimed on behalf of the Crown. Some headway has already been made in this direction, and it may be that the recent decision in another context to make available the contents of inspectors' reports on public local inquiries signifies a changing conception of what is really essential for "the proper functioning of the public service."[4]

S. A. de Smith.

## The Master's Indemnity—Variations on a Theme

### (*Continued*)[1]

In dealing with the second limb of the defendants' case, that based upon the Law Reform Acts of 1934 and 1935[2] McNair J. dealt with three questions which must be set out at some little length:

1. What is the nature of the right to contribution under the Act of 1935? If the third party proceedings for contribution were proceedings "in respect of a cause of action in tort" then, since the third party notice was not issued until more than six months after the third party had been granted letters of administration, they would be barred by section 1 (3) of the Act of 1934. McNair J. held, in accordance with authority[3] that the right to contribution is *sui generis* and therefore not within the words of section 1 (3).

2. Was a cause of action for contribution subsisting against Galway at his death so as to survive against his administratrix under section 1 (1) of the Act of 1934 or at common law? The prima facie answer to this question is No, since the right to contribution only arises when the claimant has been held liable or at least has met the claim against him.[4] However, by section 1 (4) of the Act of 1934, the cause of action was to be deemed to have subsisted against Galway at his death and therefore survived.[5]

3. Is there in the expression in section 6 (1) (*c*) of the Act of 1935, "who . . . would if sued have been liable" any temporal connotation referring to the time at which the hypothetical action supposed by the subsection must be assumed to have been brought? If the expression means a person who, if sued at the time that the original claimant is sued would have been liable, or if it refers to

[4] But the pace of change is slow: see the discouraging answers given by the Attorney-General to parliamentary questioners who had asked that a committee be appointed to review the existing law and practice in relation to "Crown privilege" (598 H.C.Deb. 19–20, 855–856 (January 20 and 27, 1959)).

[1] The first part of this Note on *Harvey* v. *O'Dell, Ltd.* (*Galway Third Party*) [1958] 2 Q.B. 78 appeared in the previous number ((1959) 22 M.L.R. 71), to which the reader is referred for the facts and general decision in the case.

[2] For the text of the relevant sections see the appendix to this note.

[3] *George Wimpey* v. *British Overseas Airways Corporation* [1955] A.C. 169; *Post Office* v. *Official Receiver* [1951] 1 All E.R. 522.

[4] *George Wimpey* v. *B. O. A. C.* [1955] A.C. 169.

[5] Under s. 1 (1). McNair J. thought that the cause of action would also survive at common law, but the operation of s. 1 (4) is restricted to "the purposes of this Act."

the time at which the proceedings for contribution are themselves started, then the third party was not within the subsection since both the writ and the third party notice were issued more than six months after letters of administration had been granted. This question was the subject of much discussion in the House of Lords in *George Wimpey & Co., Ltd.* v. *British Overseas Airways Corpn.*[6] when a bewildering variety of solutions was suggested. No final ruling was made, however, and McNair J. was therefore free to follow the earlier decision of Donovan J.[7] and to hold that no temporal connotation was intended. The third party was, therefore, a person "who . . . would if sued have been liable."

Having thus answered the three questions favourably to the defendants McNair J. held that the third party was liable and fixed the amount of the contribution payable by her so as to give to the defendants a full indemnity.

No criticism is here offered either of the answers given by McNair J. to the three questions he asked nor to the actual conclusion reached. Galway actually caused the damage and was probably covered by an insurance policy. The decision that his estate was liable is, therefore, to be welcomed. Unfortunately, however, the learned judge's approach to the problem does not make it clear how he actually reached his conclusion and it is necessary to look more closely at the purely technical aspects of this part of the case. The trouble is that there are two different routes by which McNair J. might have reached his conclusion, to neither of which—with the possible exception to be considered below—was the answer to all three questions necessary.

At the time of his death there existed against Galway, as well as against the defendants, a cause of action for negligence at the suit of the plaintiff. This cause of action survived against his estate under section 1 (1) of the Act of 1934 but, since proceedings brought by the plaintiff would clearly have been proceedings "in respect of a cause of action in tort" they would have been barred after the expiry of six months from the date when the third party took out letters of administration. In view of McNair J.'s answer to question 3 however, and since proceedings for contribution are not proceedings "in respect of a cause of action in tort" (question 1) the claim to contribution was valid. To this line of argument it is irrelevant to decide that a cause of action for contribution subsisted against Galway at his death. The solution to question 2 is immaterial.

Alternatively the case against the third party may be put as follows: by virtue of section 1 (4) of the Act of 1934 a cause of action for contribution is to be deemed to have subsisted against Galway at his death (question 2). This cause of action survived

[6] [1955] A.C. 169.
[7] *Morgan* v. *Ashmore* [1953] 1 W.L.R. 418.

against his estate [8] and, since proceedings for contribution are not proceedings "in respect of a cause of action in tort" (question 1) they could be maintained against the third party more than six months after she was granted letters of administration. The answer to question 3, with the exception to be mentioned, is irrelevant.

The one possibility in which the answer to all three questions may be regarded as necessary is if there is a temporal connotation to the words in section 1 (4) of the Act of 1934 "in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered." If those words mean "would have subsisted" at the time that proceedings are actually brought against the deceased's personal representatives, and if those proceedings are begun after the lapse of a period longer than the ordinary period of limitation but within six months of the personal representatives having taken out representation,[9] then and then only is it necessary to provide an answer to all three questions. This all seems so far fetched that it is unlikely that McNair J. had it in mind, and in any event *Airey* v. *Airey* [10] had not been decided when judgment in the present case was delivered. Moreover if it is to be taken that McNair J. did have this situation in mind, then he must be taken to have decided that although there is no temporal connotation to the words "who . . . would if sued have been liable," there is nevertheless a temporal connotation to the words "would have subsisted." This would be odd to the point of absurdity.

One is left in doubt, therefore, as to the true reasoning behind McNair J.'s decision, and this is unfortunate not only because a doubt is left but because still further confusion is introduced into this confused area of the law. If it may be said with respect, McNair J. is not to be blamed for having left or even for having created uncertainty. *Wimpey's* case [11] brought to light some of the grave difficulties of interpretation created by the Act of 1935. Although similar difficulties have not on the whole been created by the Act of 1934, it is hardly surprising that the present case, which called for the combined application of both Acts, should

[8] s. 1 (1).

[9] See *per* Diplock J. in *Airey* v. *Airey* [1958] 1 W.L.R. 729, 734; "It would seem . . . that today, although so long as a tortfeasor lives no action can be brought against him for damages for personal injuries after three years have passed since the cause of action arose, the moment he dies, however long after the cause of action arose, an action can be brought for the tort against his personal representative, since the only limitation period for such an action is six months after the appointment of his personal representative. A cause of action does not cease to exist because a limitation period has expired, and the original cause of action would therefore be one subsisting against the tortfeasor at the time of his death, and would survive against his estate by virtue of section 1 (1) of the Act of 1934." The Court of Appeal reserved its opinion on the point. *Ibid.*, at p. 743.

[10] [1958] 1 W.L.R. 729.

[11] [1955] A.C. 169.

show that confusion is thus made worse confounded. Is clarification by amending legislation too much to ask?

One last point may be made on this complicated case which may emphasise still further the need for reform of this part of the law. As appears from the judgment Galway was not in fact solely to blame for the original accident. One Bolt, the driver of the car involved, was also found to have been negligent—though he was not a party to the action. More than six years have now elapsed since the accident and therefore any possible proceedings against him by the plaintiff would now be barred by limitation. The defendants have now recovered a full indemnity from the third party, but could she not now bring a claim for contribution against Bolt? The words "who . . . would if sued have been liable" have no temporal connotation and time did not begin to run against the third party until the decision in the present case. It seems therefore that the third party still has more than five years [12] in which to bring proceedings against Bolt, to say nothing of a further period of something over six months after his death if Diplock J. in *Airey* v. *Airey* [13] be correct. Is this really good law?

## Appendix

*Law Reform (Married Women and Tortfeasors) Act, 1935*

Section 6 (1): Where damage is suffered by any person as a result of a tort . . . (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise. . . .

*Law Reform (Miscellaneous Provisions) Act, 1934*

Section 1 (1): Subject to the provisions of this section, on the death of any person . . . all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. . . .

Section 1 (3): No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless. . . . (b) . . . proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

Section 1 (4): Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

J. A. Jolowicz.

[12] The third party's cause of action against Bolt came into existence when judgment was given against her in the present case, *i.e.*, on February 18, 1958.
[13] See note 9, *ante*.

## Families Personal and Diplomatic

In *Re C.* (*an infant*) [1] the two questions that arose for decision for the first time were: (a) whether the personal families of a foreign envoy's "diplomatic family" are immune from the jurisdiction of the English courts, and (b) if so, whether a child not resident with his father is a member of that father's personal family. Harman J. decided that the answer was "yes" to both questions.

Briefly, the case arose because the English stepmother of a Greek boy of fifteen applied to have him made a Ward of Court so that the boy's father could not send him to continue his education in Greece without the approval of the court. The father, who was an accredited member of the Greek embassy in London, entered a conditional appearance and applied for a stay of the proceedings on grounds of his diplomatic immunity. The question then emerged whether the boy himself could be made a respondent to the proceedings, or whether he was likewise immune from the jurisdiction of the court. The Diplomatic Privileges Act, 1708,[2] speaks of "any Ambassador, or other Publick Minister of any Foreign Prince or State, authorised and received as such by her Majesty . . . or the Domestick, or Domestick Servant of any such Ambassador." The word "Domestick" has been interpreted to mean a member of the Ambassador's household [3] or his "diplomatic family" as well as his personal family.[4] But although Harman J. spoke of section 3 of the Act of Anne as "governing" the matter, it seems to be generally accepted that the Statute is not exhaustive, but merely declaratory of part of the common law.[5] More recent Statutes confirm general acceptance today of the view that the personal families of those entitled to diplomatic immunity are also immune. Thus the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, dealing with the staff of High Commissioners, extends immunity to "members of the family of a chief representative or of a member of the official staff of a chief representative entitled to immunity," while the Diplomatic Immunities Restriction Act, 1955 speaks of "the personal immunities conferred by law on the envoys of foreign sovereign Powers accredited to Her Majesty, their families and servants, and members of the official staff of such envoys and their families. . . ."

1 [1958] 3 W.L.R. 309.
2 7 Anne, c. 12.
3 By Lord Dunedin in *Engelke* v. *Mussmann* [1928] A.C. 433, 447.
4 By Lord Phillimore, *ibid.*, p. 450.
5 See Lord Dunedin [1928] A.C. 447: "the statute of Anne does no more than confirm the common law and annex certain penalties to those who transgress it"; Lord Warrington of Clyffe, *ibid.*, p. 458: "It is well settled that the questions we have been discussing do not depend on the statute, but are principles of common law having their origin in the idea of the comity of nations." Blackstone, *Commentaries*, Vol. I, p. 247, appears to have taken a different view.

Confronted with such evidence, it is hardly surprising that Harman J. held that the families of diplomats are entitled to immunity. It seems probable that this particular question has not been ventilated in the courts before because of the unlikelihood of proceedings against a member of a diplomat's family which do not impinge on the immunity of the diplomat himself. Moreover, whilst some aspects of diplomatic immunity are causing justifiable concern, these do not affect the family lives of members of Embassy staffs, and it is surely a welcome sign that the common law, insofar as it is founded on the comity of nations, is still regarded as possessing an inherent power of growth.

The next question, that of whether the boy was a member of his father's family, arose from the peculiar facts of the case. Harman J. held that for the purpose of the proceedings, he was not prepared to hold that the child was a member of his father's family unless he was ordinarily resident with or under the father's control. There was no doubt that the father had largely handed over the control of his son to his second wife, an English woman whom he had married when the child was eight years old. A year after the marriage she had, without demur on her husband's part, brought the child to England and installed him with her parents in the country. When in the following year he was sent to Greece to start his schooling, neither his father nor stepmother considered the experiment satisfactory, and the child returned to a boarding school in England in 1954, and was moved to another English boarding school in 1957. Until 1956, when he obtained his employment with the Greek Embassy, the father had had little money and had neither maintained nor educated his child; nor had the child lived under a roof provided by his father until 1958, when he had done so for about a week. The change in the father's circumstances in 1956 coincided with his separation from his wife, and without having repaid the money which she and her parents had laid out on the child's maintenance and education, he now proposed to return him to Greece to continue his education there. Hence the wife's application to the court. After considering all the circumstances, however, Harman J. came to the conclusion that the father had never surrendered his parental rights, and in particular he had always "had a say regarding the school to which the boy should go." The son remained a member of his family, and was immune from the jurisdiction of the English courts.

The decision seems wise, as it would clearly be undesirable that the court should assert jurisdiction over the children of foreign diplomats. If (as may be generally desirable) parental authority is to be increasingly subjected to the overriding authority of the courts, the diplomatic corps is not a suitable field for experiments in this direction.

O. M. Stone.

## Contractual Obligation and the Conflict of Laws: Contracts of Insurance

The number of reported decisions on the conflict of laws with regard to contracts of insurance is astonishingly small, especially in view of the international character of the insurance business, and in comparison with the truly gigantic amount of relevant cases in the United States.[1] Still—the ubiquity of insurance companies has given rise to litigation in connection with Peace Treaty legislation and also in connection with the consequences of the Russian Revolution. Other decisions have dealt with the incidence of the risk of currency depreciation. Now, in *Pick* v. *Manufacturers Life Insurance Co.*,[2] Diplock J. had to answer the question where the insurance money was payable which would become due under a life endowment policy issued by an Ontario company to a German national, resident in Palestine at the time of the contract and in Western Germany at the time of the action, and, according to its terms, to be discharged "in bankers' demand drafts on London, England, for pounds sterling." The defendants (the insurance company) maintained that Israel was the place of payment, the plaintiff (the policy holder) that the sum would be payable in Germany or wherever he would be resident at the time of payment. The real point in issue was whether the contract was governed by Israeli law. If Israeli law applied, it determined the question how the obligation was to be discharged, and the answer, according to the Israeli currency legislation, was that it would have to be discharged in Israel in Israeli currency. The question before the learned judge was thus answered as soon as he had decided that Israeli law was not the proper law of the contract. It was not one of those cases in which, perhaps with the aid of complicated and sometimes slightly unreal presumptions, a court has to determine what place the parties had intended as the place of payment. The problem was not what place of payment the parties had expressly or implicitly agreed upon, but whether a law applied which fixed the place of payment without regard to their agreement. The learned judge held that the contract was governed by the law of Ontario, that all payments were, irrespective of Israeli legislation, to be made in bankers' demand drafts on London in sterling (unless, indeed, the plaintiff chose to be paid in Israel), and that Israel was not the sole place of payment. It seems, although the learned judge assumed this without making it explicit, that the rule according to which the debtor must seek out his creditor applied in the absence of any proved difference between Ontario law and English law, and that consequently payment was to be made at the place at which the policy holder resided for the time being. This was implied in the observation made by the judge that one

[1] See Carnahan, *Conflict of Laws and Life Insurance Contracts*, 1942.
[2] [1958] 2 Lloyd's Rep. 93.

of the places where the plaintiff could demand payment was Israel.

For a variety of reasons the case is of interest beyond the comparatively narrow question in issue. Some of the important matters discussed in the decision are these:

(1) The determination of the proper law. The judge was not content to say that *in dubio* the centre of administration and control of an insurance company determines the proper law of the policies it issues. He went into a minute analysis of the "surrounding circumstances" to find the so-called implied intention of the parties. Technically, the contract was made in Palestine because, by its terms, it did not take effect until the policy (which had been signed at Toronto) had been delivered to the plaintiff at Haifa. Considerable importance for the determination of the proper law would, in the judge's view, have attached to the *locus contractus* if both parties had performed in the same country all the acts necessary for completion. "I think less weight attaches to it where the actual place of completion depends on technical matters, and may indeed be one place in the view of one system of law and a different place in the view of another system." This, it is submitted, is a very happy formulation apt to reduce the significance of the *lex loci contractus* to its proper dimensions, a formulation which might perhaps help to lay the ghost of the ancient controversy between the author of the American Restatement and his principal critic, and which might be considered by those now responsible for drafting a new Restatement.

In determining the proper law the learned judge used the formulations of the "subjective" school of thought. Indeed, he went so far as to say "that in ascertaining the proper law of the contract, which contains no express provision on this matter, the court is performing the familiar function of construing the contract and ascertaining what term is to be implied." It is however submitted that, to justify what he was actually doing, the learned judge might just as well have said that the law of Ontario was the one most closely connected with the contract. In choosing the "subjective" formulation he involved himself in a perhaps unnecessary difficulty by saying that "points of some nicety may arise where the rival systems of proper law have themselves different rules of construction of contracts, that is to say, as to the method of ascertaining the intention of the parties thereto." The "objective" school of thought avoids this difficulty, but it is submitted that it does not even arise within the framework of the "subjective" method. The construction of the contract which, according to this view, is the essence of the determination of the proper law, is part of the process of the choice of law, a process on principle governed by the *lex fori*. From the "subjective" point of view an English court when construing a contract

for the purpose of finding out what law the parties have "implicitly" chosen must apply English canons of construction, if only for the reason that at this stage the court has not yet any justification for applying any other law, the application of which would necessarily be based on circular reasoning. Those who adopt the "objective" point of view regard the invocation of the non-existing "intention" of the parties as unnecessary, and as an involuntary concealment of the fact that it is the court that determines the proper law and not the parties. It is submitted with great respect that the statement made by Singleton L.J. in *The Assunzione*,[3] although quoted by Diplock J. for the "subjective" approach, in fact expresses the objective view because Singleton L.J. referred not to what the parties intended but to "what just and reasonable persons ought to have intended."

(2) The application of the proper law. The case is an additional authority for the now generally accepted proposition that the discharge of a contractual obligation is governed by the proper law of the contract. There is nothing new in this, but in the present case the judge had to deal with an argument advanced by counsel for the defendants according to which, whatever be the proper law, the defendants' obligation to pay the policy moneys was governed by the law of Israel, this being the country in which the money was "primarily" payable. This argument was based on the familiar fallacy that the performance of an obligation is governed by the *lex loci solutionis*,[4] a fallacy, as Dr. Morris says, "exploded" by the decision of the Privy Council in *Bonython* v. *Commonwealth of Australia*.[5] This fallacy was, however, linked with another: As the learned judge pointed out, the defendants' argument confused the question what law governed the discharge of a contractual obligation with the entirely different question where, for the purpose of determining the law governing the transfer of the obligation as a movable, a chose in action, the obligation is situated. The distinction between the contractual and the property aspect of the matter is made very clear in the present case. The "primary" place of payment is relevant only for the determination of the situs, but it has nothing to do with the law governing the discharge of the obligation, unless the law of that place happens to be the proper law. In this respect the present case repeats the lesson already taught by the decision of Wynn-Parry J. in *Re United Railways of the Havana and Regla Warehouses, Ltd.*,[6] and it should be contrasted with other decisions arising from the "ubiquity" of insurance companies such as *New York Life Insurance Co.* v. *Public Trustee*[7] and *F. & K. Jabbour* v. *Custodian of Absentee Property*

[3] [1954] P. 150 at p. 179.
[4] See Morris, 6 Vanderbilt L.R. 516.
[5] [1951] A.C. 201.
[6] [1958] Ch. 724; [1958] 2 W.L.R. 229 (see (1958) 21 M.L.R. 174), affirmed by the Court of Appeal [1959] 2 W.L.R. 251; [1959] 1 All E.R. 214.
[7] [1924] 2 Ch. 101 (C.A.).

*for the State of Israel.*[8] These were concerned with the involuntary transfer of rights arising from policies which is governed by the *lex situs.*

As regards the choice of the law applicable to non-marine contracts of insurance in general, it would be wrong to draw too many conclusions from the case. As indicated in Dicey, *Conflict of Laws*,[9] one may perhaps discern in some of the earlier cases a tendency to apply the law of the place of residence of the assured, a tendency which might (and perhaps should) be reinforced by considerations of social policy where legislation intended to protect the assured is in force at the place where he resides or carries on business. On the other hand, however, the present case shows (as did some other earlier cases) the effect of the high degree of centralisation in the organisation of insurance companies with an international range of business activities. The fact that policies have to be signed at the head office, and also the tendency to develop standard policy forms, must have a strong influence on the selection of the proper law of the contract by the courts. The significance in this respect of a local branch of an insurance company appears to be very different from that of a bank branch: the branch manager opens the account, but the manager of an insurance branch cannot normally issue a policy, not at any rate a life policy. Hence, perhaps, also a tendency to consider the law in force at the place where the account is kept as the proper law between banker and customer, but not necessarily a universal tendency in the same direction in connection with insurance policies. The entire problem of the conflict of laws with regard to insurance is much in need of monographic treatment, and the statement in Dicey's *Conflict of Laws*, mentioned above, may be in need of further qualification.

O. K.-F.

## "Shot-Gun" Marriages and the Conflict of Laws

In *Parojcic* v. *Parojcic* [1] Davies J. was confronted with a set of facts which, even in these days of refugee problems, appears stranger than fiction. The petitioning wife, who was seeking a nullity decree, came of a non-communist family living in a Yugoslav village inhabited by a largely communist population. Her father, after fighting in the anti-communist forces there, left the petitioner and her mother behind in their native land and eventually reached England in 1947, where he acquired a domicile of choice. The petitioner and her mother, after many hardships, were finally permitted to leave Yugoslavia for England, where they arrived on

[8] [1954] 1 W.L.R. 139.
[9] 7th ed., p. 837, note 38.
[1] [1958] 1 W.L.R. 1280; [1959] 1 All E.R. 1.

November 11, 1956. The report states that [2] " there was no doubt that, whatever the technical position had been up till then, when they came here they had abandoned any domicile of origin and acquired a domicile of choice in England." [3]

When the father met his family on arrival at Victoria Station, he was accompanied by an *émigré* compatriot friend of his, aged 35, the respondent in the suit, to whom he had promised his daughter's hand in marriage despite the fact that they did not know one another. The father at once introduced the respondent to his daughter as the man she was going to marry. The petitioner turned down this proposal flat. During the following weeks both she and her mother tearfully and bitterly opposed the match but the father (whom the judge described as [4] " almost a stranger to [his daughter] after years of separation and who may well have been imbued with ideas of *patria potestas* which were fundamentally foreign to [her] "), continually insisted that the marriage must take place. In the course of constant quarrels on this account, the father more than once threatened that, if the petitioner persistently refused to marry, he would send her back to Yugoslavia. This terrified the girl, who, knowing of the likely results of that action, told her father she would rather kill herself than be sent back. Whether the father could in fact have implemented his threat or not is, of course, a matter of surmise, but the court assumed that both father and daughter believed that she could have been sent back. On the day before the marriage ceremony took place, it appears, the father actually struck his daughter in the course of an argument.

On December 29, 1956, the parties went through a ceremony of marriage at the Oxford Register Office. It was conducted in the English language, which the petitioner hardly understood at all, but a friend translated the material declarations into Serbian for her benefit, and she repeated them after him. After the ceremony, the petitioner was told that she was married; she said she refused to believe it to be so and went home, locked herself away and wept. Since she and the respondent had only met on the occasion of her arrival in England and at the register office, the marriage was never consummated. The petitioner sought her decree on the following grounds: (1) that she mistook the ceremony of marriage for a service of betrothal, and (2) that she had been induced to go through the ceremony by duress on her father's part. The proceedings were undefended and judgment was reserved.

[2] *Ibid.*, at p. 1281.

[3] Technically, of course, both wife and daughter (who was stated to be 21 on her marriage certificate) would have acquired an English domicile of dependence as soon as the father acquired his domicile of choice there. To hold them domiciled, in their circumstances, in England *before* they arrived there would seem to stretch the doctrine of unity of domicile to bursting point.

[4] [1958] 1 W.L.R. at pp. 1286–1287.

His Lordship commenced by stating that cases of this sort were of unquestionable importance, citing these words of Lord Merrivale P. in *Kelly* v. *Kelly* [5]: "In a country like ours, where the marriage status is of very great consequence and where the enforcement of marriage laws is a matter of great public concern, it would be intolerable if the marriage law could be played with by people who thought fit to go to a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it." Turning then to the question of jurisdiction, the learned judge stated himself to be satisfied that he "had jurisdiction over the whole of the present case." His reasoning,[6] somewhat surprisingly, was based on *De Reneville* v. *De Reneville*—namely that if the alleged defect rendered the marriage void (as he agreed was the case where a party's ignorance of the nature of the ceremony was proved), then the court of the wife's domicile before her marriage would have jurisdiction to annul it; if, on the other hand, the defect rendered the marriage voidable (as he was inclined to think was the case where duress was proved, as in the case of a contract [7]), then the court of the husband's domicile had jurisdiction. Having already found the petitioner's pre-marital domicile to be English, his Lordship was prepared to assume, despite the absence of direct evidence on the point, that the respondent had acquired an English domicile of choice because he found himself in England in circumstances similar to those of the petitioner's father and other *émigré* compatriots. His Lordship dealt at length with the evidence concerning the marriage ceremony itself and concluded that he was unable to find that the petitioner had in fact mistaken it for a mere betrothal ceremony, preferring, as he did, the evidence of the registry officials who performed the ceremony to that of the petitioner and her witnesses.

As to the duress point, the learned judge was prepared to take a different view, particularly as the petitioner's mother had given

[5] *Ibid.*, at pp. 1282–1283; (1932) 49 T.L.R. 99, at p. 101.

[6] *Ibid.*, at p. 1283. The resort to the *De Reneville Case* [1948] P. 100 by the learned judge is difficult to follow. So also is his statement, *ibid.*, that s. 18 (1) (*b*) of the Matrimonial Causes Act, 1950, is an exception to the *De Reneville* rule. Why should not s. 18 (1) (*a*) also be an exception?

Since he found that both parties were domiciled in England at the commencement of the suit, one would have thought that he had jurisdiction under the rule laid down in *Salvesen's Case* [1927] A.C. 641; it seems likely, too, that both parties were also resident within the jurisdiction, so that, surely, he had jurisdiction, even if the marriage were alleged to be voidable, according to *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115. It is conceded that *Casey* v. *Casey* [1949] P. 420 stood in his way against taking jurisdiction on the ground that the marriage had been celebrated here, since, as will be seen, he treated duress as rendering a marriage voidable.

One wonders, too, whether it is permissible to have resort to the *De Reneville* rule in order to discover what effect on a marriage is wrought by an alleged defect other than wilful refusal or inability to consummate.

[7] [1958] 1 W.L.R. at p. 1283, relying on Halsbury, 3rd ed., vol. 12, p. 225, which cites *H.* v. *H.* [1954] P. 258, at p. 266, and *Silver* v. *Silver* [1955] 2 All E.R. 614. *Cf.*, however, *Hussein* v. *Hussein* [1938] P. 159, where a marriage in England which had been procured by duress was held void.

evidence in that connection only and had impressed him with her testimony. As he pointed out, the kernel of the petitioner's case on this score was, in the words of Collins J. in *Cooper* v. *Crane*,[8] "that though she understood what she was doing her powers of volition were so paralysed that, by her words and acts, she merely gave expression to the will of the respondent, and not her own." On the facts as found, he held that the daughter never in fact consented to the marriage and that she had been terrified into it by her father's threats. In granting a decree nisi, Davis J. cited the following passage from the judgment of Butt J. in *Scott* v. *Sebright*[9] as being apposite, subject to the observation that it was the father here and not the husband who had exercised duress: "Long before the ceremony was gone through the feelings of this young lady towards the respondent were such that of her free and unconstrained will she never would have married him; that she had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats which in her normal condition she would have treated with the contempt she must have felt for the man who made use of them; and that, therefore, there never was any such consent on her part as the law requires for the making of a contract of marriage."

The case accordingly tends to set at rest the controversy whether duress renders a marriage void or voidable in our law by suggesting that it has the latter effect.[10] What, however, is of greater interest is that Davies J. said [11]—in connection, apparently, with both alleged defects, and without expressly citing any authority—"*it is plain that the law by which the validity of this marriage has to be tested is English law, the lex loci contractus.*" On the face of it, this is not really surprising since, strictly speaking,

[8] [1958] 1 W.L.R. at p. 1284; [1891] P. 369, at p. 376. Doubtless Davies J. intended that the word "father" should be substituted for the word "respondent" so as to suit the context of the present case. Quite a wealth of cases were cited to his Lordship in argument, but they were not, unfortunately, expressly dealt with in the judgment, despite the fact that they all deal with consent: *Way* v. *Way* [1950] P. 71, at p. 79; *Apt* v. *Apt* [1948] P. 83; *H.* v. *H.*, *supra*; *Silver* v. *Silver*, *supra*; *Ford* v. *Stier* [1896] P. 1; *Hall* v. *Hall* (1908) 24 T.L.R. 756; *Mehta* v. *Mehta* [1945] 2 All E.R. 690 and *Hussein* v. *Hussein*, *supra*. *Valier* v. *Valier* (1925) 133 L.T. 830 was not cited. It also seems extraordinary that no work on the conflict of laws was cited; Dicey, *Conflict of Laws*, 7th ed., Rule 33, pp. 266 *et seq.*, and Woodhouse (1954) 3 I.C.L.Q. 454 (whose theses this note purports to elaborate), were surely worth referring to.

[9] [1958] 1 W.L.R. at p. 1287; (1886) 12 P.D. 21, at p. 31. There is no discernible foreign element in *Scott* v. *Sebright*.

[10] *Cf.* Dicey, *op. cit.*, 7th ed., p. 267, n. 57; Bromley, *Family Law*, pp. 68–69.

[11] [1958] 1 W.L.R. at p. 1283. Italics supplied. In *Robert* v. *Robert* [1947] P. 164 the *lex loci celebrationis* was put forward by Barnard J. as a possible choice of law to govern the effect of wilful refusal on a marriage. *Cf.*, also, *Ponticelli* v. *Ponticelli* [1958] 1 All E.R. 357; (1958) 21 M.L.R. 416, on this point. Comparing the judgment in that case with that in the present case brings to light the fact that Sachs J. thinks that the *De Reneville* rule is concerned with choice of law as well as jurisdiction, whereas Davies J. considers it to be a jurisdictional rule only.

the case displays no point of contact with any foreign country at all at any material time. Indeed, one is led to an application of English law whether one follows Dicey's rule [12] that "no marriage is (*semble*) valid if by the law of either party's domicile one party does not consent to marry the other," or the rival submission of Dr. Cheshire that want of consent is a contractual defect and is governed by the *lex loci celebrationis*.[13] Even if one thought it right to apply the law of the husband's domicile or the law of the putative matrimonial home, one would still be led to English law.

At this stage, one cannot but wonder whether the English courts have not been working on the following inarticulated premises: (1) Where the gist of the petitioner's case is either (a) that he or she never intended to go through a ceremony of marriage at all and thus never intended to acquire a status of husband or wife, or, (b) that, while it was intended to go through a ceremony of marriage, it was not the intention to acquire the status of husband and wife, then it is the court's duty to decide on an objective view of the facts whether or not the parties are married. Since the English court is here acting as a mere fact-finding tribunal, it must perforce apply English law as the *lex fori* in reaching its decision and there is no need for it to refer to any foreign domiciliary laws or to the *lex loci celebrationis*, if foreign. It would seem, therefore, that one may legitimately subsume under heading (a) those cases where the petitioner's consent is alleged to be negatived by fraud or mistake as to the legal nature of the ceremony undergone; fear, if occasioned by outside factors sufficient in the eyes of the court to deprive the petitioner of freedom of volition; actual or threatened duress on the part of the respondent or a third party. Under heading (b) will come the various types of "sham marriage"—*e.g.*, where the parties have freely, voluntarily and openly gone through the proper procedure to take one another as man and wife for life to the exclusion of all others, the real intention being to achieve for one or other or both of them the fulfilment of some ulterior and extraneous purpose [14]; where the parties went through a marriage ceremony for a "dare." [15]

[12] Rule 33, *ubi supra*.

[13] *Private International Law*, 5th ed., pp. 354–356. Again it is strange that this work was not referred to, particularly as the learned judge seems to agree with the views expressed there. It is of course conceded that the *lex loci* will say whether the *effect* of the ceremony is that the parties are married or, *e.g.*, only betrothed just as it says whether a marriage is monogamous or polygamous by nature. *Cf.*, however, the case of the common law marriage.

[14] As in *Silver* v. *Silver*, *supra*.

[15] *Cf. Davis* v. *Davis* (1934) 119 Conn. 194; 175 A. 574. There the husband petitioner and the respondent wife had been on a joyride from Connecticut, where they both resided and were domiciled, to New York by car. To add spice to the occasion the respondent dared the petitioner to marry her, the dare was accepted and the ceremony was performed by a justice of the peace in New York in accordance with the local law. Neither party intended to enter into the married status; the parties returned home afterwards and

(2) Where the gist of the petitioner's case is that, although it was intended both to go through a ceremony of marriage and to acquire married status, true consent thereto was nevertheless lacking, then it is the duty of the court to inquire into the reasons advanced by the petitioner as to why his consent to the union was nullified. Since no question of intention to marry is in issue here, it is submitted that there is no reason at all why an English court should not, if the particular case before it be a conflicts case, test the validity of the marriage by reference to the ante-nuptial domiciliary law of the party whose consent is alleged to be defective. It is thought that one may properly subsume under this heading cases where the petitioner seeks a decree because he was under a mistaken belief as to the legal effects of his marriage or where his case is that he was mistaken as to the attributes of the other spouse.[16]

This solution, it is suggested, goes far to explain the circumstance that in *Cooper* v. *Crane*,[17] *Valier* v. *Valier* [18] and *Hussein* v. *Hussein* [19] the validity of the marriages, which in each case had taken place in England, was tested by English law without reference to the various connections with foreign countries apparent in each of them. It could also explain why in *Mehta* v. *Mehta* [20] an

never cohabited. The parties were each aged nineteen at the time. The Supreme Court of Errors of Connecticut held that, inasmuch as a marriage valid where celebrated is generally valid everywhere, it was for the law of New York, the place where the marriage took place, to say whether the marriage was to be declared void for lack of consent. Maltbie C.J. concluded his judgment with these words: "We find no decision of the New York courts declaring its common law as applied to such a situation as we are considering. Cases like this are naturally rare, because not often will people even young in years so trifle with such a vital relationship as that of marriage. But so fundamental is the principle that there can be no marriage without the consent of the parties, and so accepted is the rule that, though parties go through the form of a contract, if both understand that neither intends to assume a contractual obligation, no real contract is created, that we deem it a part of the general common law that in such a situation as this no marriage ever came into existence. In the absence of some contrary decision of the New York courts, we assume that this is as true in that state as we hold it to be in ours. [Citations omitted.] Upon the facts found by the trial court, the purported marriage between the parties to this action was void under the law of New York, and the court should have decreed it to be void." See also *Moss* v. *Moss* [1897] P. 263, at p. 269.

16 In *Mitford* v. *Mitford* [1923] P. 130, at p. 139, Sir Henry Duke P. spoke of the mistake of the respondent as to the petitioner's attributes as being "immaterial" under English law, but as effective under German law to avoid the contract as a mistake of identity. It is a pity that Dicey, *op. cit.*, does not deal with this case under Rule 33.

For a case on mistaken belief as to the legal effects of marriage, see *Way* v. *Way*, *supra*.

17 *Supra*.

18 *Supra*.

19 *Supra*.

20 *Supra*. Of course, it might be said that public policy demanded that English law be applied in these four cases, following *Lorentzen* v. *Lydden* [1942] 2 K.B. 202, *sed qu.* On the other hand, the result of the *Mehta* case is also explicable on the basis that valid though the marriage was by the *lex loci celebrationis*, it would be contrary to public policy to hold the petitioner

English court could hold itself able to annul a marriage celebrated in India despite its validity by that law. It would justify, too, the application of English law in *H.* v. *H.*[21] On the other hand, however, we must say of the case under review that, with all respect, Davies J. was right to choose English law, but for the wrong reason.

P. R. H. Webb.

## Assignment, Gift and Quasi-Contract

The want of precision as to the exact scope of quasi-contract in English law leads inevitably to cases which defy classification. *Shamia* v. *Joory* [1] is such a case.

The facts may be stated briefly:

> J owed X £1,300 on a running account. X wished to give S, his brother, £500, and requested J to pay £500 to S. J agreed to do this, and later wrote informing S and promising to pay him the money. Before J paid S, the account between J and X was settled, and no express mention was made of the £500 so that it was not clear how far either party had taken that sum into consideration in settling accounts. S now sued J for money had and received.

There is no general principle of English law governing the action for money had and received. Perhaps, as Lord Wright has suggested,[2] the doctrine of unjust enrichment is the foundation of quasi-contract. If that is so then we might expect some evidence of enrichment or of injustice, so that the present case would turn on the issue of fact, whether J had been given credit by X for the £500 to be paid to S. Barry J. found no evidence of any kind to support such a suggestion,[3] and therefore, since the onus of proof is on the plaintiff, the conclusion must be that J was not enriched, unjustly or otherwise. Yet Barry J. gave judgment for the plaintiff.

married when the marriage ceremony had amounted to a palpable fraud upon her. Barnard J. seems to have treated the matter of the petitioner's intention as a matter of fact; her domicile appears to have assumed importance only when he came to consider whether he had jurisdiction: see [1945] 2 All E.R. at p. 692. German law, incidentally, was never considered in *Silver* v. *Silver* (*supra*) although the marriage had taken place in Germany.

21 *Supra.* Karminski J. in fact treated English and Hungarian law (which, incidentally, rendered a marriage voidable for duress) as "largely similar." He might possibly have been invoking some supra-national law of duress; on the other hand, he might have thought that English law was applicable under s. 18 (3) of the Matrimonial Causes Act, 1950.

1 [1958] 1 Q.B. 448; [1958] 2 W.L.R. 84; [1958] 1 All E.R. 111, Q.B.D.

2 The *Fibrosa Case* [1943] A.C. 32 at p. 61. See too Winfield's suggested definition in *The Law of Quasi-Contracts* (1952), pp. 1–2: ". . . on the ground that non-payment . . . would confer . . . an unjust benefit," and § 1 of the American Restatement on Restitution. *Cf.* J. A. Clarence Smith, "Quasi-Contract" (1956) 19 M.L.R. 255.

3 [1958] 1 Q.B. at p. 460.

The learned judge purported to apply a rule stated by Blackburn J.[4] in the following terms:

> "Ever since the case of *Walker* v. *Rostron*[5] it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder."

Many cases on this branch of the law "merely purport to follow the doctrine of some previous case, and, apparently on the assumption that the previous case gives a clear rule, contain no explanation of that rule."[6] It is a pity that *Shamia* v. *Joory* is another such case, for there are several difficulties in the rule itself and in applying the rule, and Barry J.'s explanation would have made a valuable contribution to a topic about which Winfield confessed that it was "puzzling to say exactly what the law is."[7]

Perhaps the most important departure in this decision from the previous case lies in Blackburn J.'s reference to a person transferring "to a creditor on account of a debt. . . ." Here X wished to give S, his brother, a gift. "This fact," said Barry J., "cannot . . . be material. I can find nothing in principle, or in any of the authorities cited to me, which suggests the need for consideration as between the transferee and the transferor of the fund which the transferee is seeking to recover."[8]

Of the cases on "this somewhat unfamiliar branch of the law"[9] this is the first in which a gift from transferor to transferee was involved.[10] Indeed, some of the cases make especial mention of consideration[11] or of the presence of a contract.[12] This, I think,

4 *Griffin* v. *Weatherby* (1868) L.R. 3 Q.B. 753 at p. 758.
5 (1842) 9 M. & W. 411.
6 R. M. Jackson, *The History of Quasi-Contract in English Law*, Section 26 ("Claims for money received by the defendant from a third person for transmission to the plaintiff"), pp. 102–103.
7 *Op. cit.*, p. 16.
8 [1958] 1 Q.B. at p. 458.
9 *Per* Barry J. [1958] 1 All E.R. at p. 116; the passage does not appear in the Law Reports or the Weekly Law Reports.
10 See the cases referred to by Jackson, *loc. cit.*, and Winfield, *loc. cit.* All are concerned either with transfers from debtor to creditor, or with bills of exchange.
11 *Lilly* v. *Hays* (1836) 5 Ad. & El. 548, 550, 551; *Walker* v. *Rostron* (1842) 9 M. & W. 411, 420.
12 *Williams* v. *Everett* (1811) 14 East 582, as explained in *Rustomjee* v. *The Queen* (1876) 1 Q.B.D. 487, 494–495; *Malcolm* v. *Scott* (1850) 5 Ex. 601, 610, 611.

is sufficiently significant to justify a feeling of regret that the judge did not make a more detailed analysis of the situation, and of analogous situations.

The principal analogies appear to be:

1. *The assignment of choses in action.* The present transaction clearly has a close affinity to the assignment by X to S of a chose in action. Since section 136 of the Law of Property Act, 1925, had not been complied with there could be no legal assignment. Nor, as Barry J. expressly held, was S entitled to base his claim on an equitable assignment—not because he had failed to join X, the "assignor," as a party to the action, but "because there was no evidence that notice of the assignment had in fact been given to [S]."[13] But the value of assignment as an analogy is not lessened by these technicalities, and it will be recalled that Blackburn J. was describing a way in which "that which was merely an equitable right becomes a legal right in the transferee, founded on the promise." What equitable right did the transferee have before the promise? The only real possibility in most of the older cases was that he was an equitable assignee, and we must bear in mind that the doctrine was developed at a time when, although equitable assignments were possible, the assignee could not sue in his own name at common law. We see here, perhaps, the courts of common law groping their way before 1875 to the enforcement of assignments, but basing the principle on the debtor's promise rather than on the assignment itself. Insofar as assignment is a valid analogy, it is strange that the judgment ignored the controversy as to the need for consideration in an equitable assignment of a legal chose in action.[14]

2. *The revocation of a promised gift.* If the issue of the defendant's unjust enrichment was not material, it might be thought something would turn on whether the donor, X, was entitled to revoke the gift as against the donee, S. If X had promised S the £500, X would not have been liable to S if he had changed his mind. Suppose X had handed the £500 to J for the purpose of paying S, could X not have revoked J's authority to pay and claimed the money back? If not, then on what basis would he be prevented from doing so, particularly in the light of the well-known rule that equity will not perfect an imperfect gift?[15] In view of the state of the evidence in *Shamia* v. *Joory*, these are surely relevant points to discuss.

Aubrey L. Diamond.

[13] See *Morrell* v. *Wootten* (1852) 16 Beav. 197; O. R. Marshall, *The Assignment of Choses in Action*, pp. 100–103; Snell's *Equity*, 24th ed., p. 72.

[14] Marshall, *op. cit.*. Chap. IV; R. E. Megarry (1943) 59 L.Q.R. 58 (and the works cited on pp. 58 and 59) and 208; H. A. Hollond (1943) 59 L.Q.R. 129.

[15] See too S. J. Stoljar, "A Rationale of Gifts and Favours" (1956) 19 M.L.R. 237.

## Policy-Orientation in Matrimonial Property Law

With the continuing high degree of marriage-instability and the resulting number of economic claims between husband and wife, it is becoming increasingly evident that some attempt must be made to analyse the underlying policy-orientation of recent decisions. Only through a clearer articulation of the goals towards which the courts are reaching, and a more explicit analysis of how they put their policies into effect, can the traditional legal formulae achieve any predictive value.

At least three of the underlying policies of the modern law are inherent—in one form or another—in the recent Court of Appeal decision of *Richards* v. *Richards*.[1] There, the husband was continually on active service in the Royal Navy from the time of the marriage in 1943 until 1956, when he left the service. During this time he gave his wife a maintenance allowance varying according to his circumstances, and she lived and brought up the child of the marriage in her parents' home. In 1949, without the husband's knowledge, the wife, her mother and father, between them bought a new home for their joint use—£1,000 being paid as initial deposit by the wife (partly out of savings from the allowance from her husband and partly from her own work), and the balance of £3,100 taken on mortgage, with her mother and father supplying over one-half the monthly instalments. The husband, when told, made a £150 gift to buy household equipment, and slightly increased his maintenance allotment. Finally, when the marriage was breaking up, he presented a summons under section 17 of the Married Women's Property Act for a half-share in the house and equipment, and brought the present appeal (heard in October, 1958), after his wife's decree of divorce had been made absolute.

Let us, then, examine the three social policies which this decision represents and plot the course of each through the related fields of matrimonial law. The first is, in fact, procedural, making way for the remaining two on a substantive plane. It is that of increasing as much as possible the social (legal) control of domestic relations for the better advancement of community goals. Section 17 of the Married Women's Property Act, of course, is an admirable medium for this, since it allows parties to set the decision-making machinery in progress at any time that they are still husband and wife. So, if there is simply a breakdown of marital relations without further formal action,[2] or a judicial separation,[3] or even divorce proceedings with the summons under

[1] [1958] 1 W.L.R. 1116; [1958] 3 All E.R. 513.

[2] See, *e.g.*, *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 All E.R. 863; *Silver* v. *Silver* [1958] 1 All E.R. 523.

[3] See, *e.g.*, *Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 792; *Cobb* v. *Cobb* [1955] 2 All E.R. 696; *McDowell* v. *McDowell* (1957) 107 L.J. 184.

section 17 entered before the decree becomes absolute,[4] then the court will be able to adjust the economic relations at least to a limited extent. Yet, full-scale adjustment—absolutely vital if the remaining two policies are to be given full play—is not possible. The answer here must lie in reviewing the present structure of maintenance laws. It is a great pity, for example, that the Morton Commission thought fit to find against the introduction of a power of property disposition in magistrates' courts.[5] The decision was not based entirely, as they themselves confessed,[6] on the undesirability of giving these courts a power which they might not be able to wield satisfactorily, but also on the notion that it would be foolish to intertwine the "temporary" maintenance order with a "permanent" disposition of the home. The inaccuracy of this fear, however, is not only apparent from its very terms of reference,[7] but it is pointed up by the practices of the American courts, who are increasingly allowing a wide adjustment of property relations on applications for separate maintenance.[8] Similarly, the Commission's approval of wider powers to deal with the home on divorce[9] might well have comprehended some provisions authorising disposition when the court refused to grant a decree.[10] A refusal of formal dissolution does not mean that there is any less a breakdown of the marriage.

Secondly, when a court is invoked to settle economic claims on the breakdown of a marriage, it must reach its decision on the basis of some observable policy. Investigations of "intention at the time of the purchase" and "nominal ownership" are notoriously unproductive.[11] The presumptions of joint assets,[12] gift from

[4] See, *e.g.*, *Hichens* v. *Hichens* [1945] P. 23; *Fribance* v. *Fribance* (No. 1) [1956] P. 99; [1955] 3 All E.R. 787; *Richards* v. *Richards*, above.

[5] See Report, Cmd. 9678, 1956, s. 656.

[6] *Ibid.*, ss. 658–659.

[7] There is no reason why the award of *possession* of a home should not be subject to the same rights of review as maintenance orders presently are (Summary Jurisdiction Act, 1895, s. 7). Indeed, it is a common practice now to make an order for payments with a deduction for as long as the husband is actually providing a home. If he then fails to do this, the wife has a right to claim an increase in her allowance: See, *e.g.*, Morton Commission Report, s. 1047; *Bramwell* v. *Bramwell* [1942] 1 K.B. 370; [1942] 1 All E.R. 137; *Thomas* v. *Thomas* [1948] 2 K.B. 294, 298; [1948] 2 All E.R. 98, 99; *Cardiff Corp.* v. *Robinson* [1957] 1 Q.B. 39, 44–45; [1956] 3 All E.R. 56, 57.

[8] See, *e.g.*, 2 Vernier, *American Family Laws*, 471–485 (1932); *Rowe* v. *Rowe*, 256 Ala. 491, 55 So. 2d 749 (1951); Colo.Rev.Stats., 1953, s. 46–7–4 and *Vines* v. *Vines*, 326 P. 2d 662 (Colo., 1958); *Randall* v. *Randall*, 158 Fla. 502, 29 So. 2d 238 (1947); Kan.Gen.Stats.Rev., 1949, s. 60–1516 and *Brayfield* v. *Brayfield*, 175 Kan. 337, 264 P. 2d 1064 (1953); *Radermacher* v. *Radermacher*, 61 Ida. 261, 100 P. 2d (1940); Ohio Rev.Code, 1953, ss. 3105–18, 3105–20 and *Morrison* v. *Morrison*, 102 Ohio App. 376. 143 N.E. 2d 591 (1956).

[9] Report, ss. 687–698.

[10] See, *e.g.*, the practices in California (*Mason* v. *Mason*, 219 Cal. 111, 25 P. 2d 641 (1933)) and South Dakota (S.D. Code, 1939 s. 14.0727.)

[11] See Evershed M.R. in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63, 72–73; [1952] 2 All E.R. 863, 866; Romer L.J. in *Cobb* v. *Cobb* [1955] 2 All E.R. 696, 699; Denning and Morris L.JJ. in *Fribance* v. *Fribance* (*No.* 2) [1957] 1 All E.R. 357, 359–360, 361.

[12] See below, p. 210.

husband to wife [13] and resulting trust,[14] are merely complementary and offer no precise criteria for prediction. In such circumstances, the decision must rest with the predispositions of the court—but the writer suggests that these predispositions ought to be controlled by special policy motivations . . . and openly instead of covertly. The traditional basis of the law governing the economic relations of husband and wife has been that of the male's liability to guard the female against need, on the assumption that he was more likely to be able to provide for two than she was.[15] And we should recognise more clearly, freeing our minds from artificial concepts of "fault" or "ownership," that this remains one of the basic aims of marital property law. The very essence of the deserted wife's licence, for example, presupposes the *need* of the wife to be protected from economic hardship, while one of the last cases in the modern series of beneficial ownership disputes—*Silver* v. *Silver* —showed most plainly how a judicious wielding of legal "principles" could give the result most likely to provide against the need which obviously existed on the wife's part.[16] It is interesting, too, to see how in cases of this sort, the husband's identification of himself as the *claimant*, *i.e.*, the person wishing to relieve the wife of substantial property rights, has frequently weighed against him in the ultimate decision.[17]

In *Richards* v. *Richards* this pattern continued, and there is every reason to suspect, from the facts set out in the report, that the husband was much more able to *do without* the house than was the wife. She had, for instance, to keep her fourteen-year-old daughter, and, her father having died, no doubt she would have to provide to some extent for her mother, who was also living in the house. Moreover, the report points out that the allotments from her husband's salary finished when he left the Navy in 1956, and so we must assume that for at least two years she had been receiving no support from him.

Lastly, the courts must focus on the increasing democratisation of the family. In a large number of families, the normal balance is no longer that of the husband being the provider and the wife and children the recipients. Both wives and children are playing

[13] *e.g.*, in *Silver* v. *Silver*, above.

[14] *e.g.* in *Re Rogers' Question* [1948] 1 All E.R. 328.

[15] Although see the comment below, pp. 209–210.

[16] See the writer's note in (1958) 21 M.L.R. 419.

[17] In none of the recent cases has a plaintiff-husband succeeded in obtaining an order giving him sole ownership. In *Cobb* v. *Cobb*, *Silver* v. *Silver*, above, *McKinnon* v. *McKinnon* [1954] N.Z.L.R. 567 and *Peychers* v. *Peychers* [1955] N.Z.L.R. 564, the court's response was to give him *less* than he claimed, while in *Barrow* v. *Barrow* [1946] N.Z.L.R. 438, *Thomson* v. *Thomson* [1944] N.Z.L.R. 1047 and *Sopow* v. *Sopow*, 24 W.W.R.(N.S.) 625 (B.C., 1958) the court allowed the husband to participate in the tenancy, since this was the sole extent of his claim.

an increasing role in supporting their families—statistics,[18] as well as the observation of such peculiarly legal phenomena as the common modern use of the joint tenancy [19] and feminine contribution to the purchase of marital property,[20] show as much. The result has been, of course, at least a limited recognition of the "joint venture" of marriage in these very cases, and a developing feeling of joint responsibility in other fields.[21] As a leading American authority put it some years ago, one of the basic criteria for decision should be:

> "What the law should call a fair contribution of each party to that joint venture (marriage). This fits the modern pattern and is flexible for the inevitable variations in this pattern that the future may bring." [22]

This feature undoubtedly received its due weight in the present case. Morris L.J.'s preliminary remark that

> "the present is not a case where parties to a marriage have by their joint efforts saved money in order to buy a house," [23]

indicates this. Certainly, some of the wife's contribution to the purchase-price came originally from the husband but much was the result of her own labours, and throughout the whole process of buying the property, there was no concept of "joint venture"—and, indeed, if there was, it comprised the wife and her parents and not the husband. From an overall perspective, too, the *marriage* was hardly a joint venture, so far as its economic basis was concerned. The husband was away for thirteen years but for his leaves, and there is no evidence of any common contribution to a fund to provide for themselves, to bring up their child, or to plan their future life together. Taking the focus of attention off their "intentions," it is, of course, entirely conceivable that the husband might have been introduced into beneficial ownership *after* the original purchase,[24] but there was neither communal life nor joint endeavour in this case to raise a presumption that they should share in the home.

[18] *e.g.*, married women now form 11.3 per cent. of the total English labour force: personal communication from the Economic Division of the British Information Services, New York 20.

[19] See, *e.g.*, the formal use of this in New Zealand (Joint Family Homes Act, 1950, as amended) as a family investment.

[20] In no reported case concerning the beneficial ownership of a home has the wife's actual financial contribution been absent.

[21] See, *e.g.*, the "family expenses" statutes in the United States (3 Vernier, s. 160 (1935); McCurdy, *Cases on Domestic Relations*, 4th ed., 680 (1952); Jacobs and Goebel, *Cases and Other Materials on Domestic Relations*, 3rd ed., 764 (1952)), which recognise the mutuality of the duty of support.

[22] Sayre, "A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services," 29 Va.L.Rev. 857, 862 (1943).

[23] [1958] 3 All E.R. at 517.

[24] See, *e.g.*, the suggestion of Turner J. in *Sutherland* v. *Sutherland* [1955] N.Z.L.R. 689, 694 that the division of the ownership might be substantially different if the parties had lived together for several years, rather than separating shortly after the marriage.

From this policy-oriented angle, of course, it is impossible to give accurate prediction of decisions many years hence. Changing social relations and, necessarily, changing social policies, make this impossible. But the thought is that perhaps a more positive attention to the policy questions inherent in these cases of our own lifetime may produce some degree of accuracy in short-term prediction and, indeed, if carried far enough by judicial decision, materially affect social thought and attitudes.

Alan Milner.

## Causation and Contributory Negligence in the Abstract

In *Nolan* v. *Dental Manufacturing Co., Ltd.*[1] a tool setter was injured in his left eye when a chip flew off a tool which he was sharpening on a carborundum grinding wheel. Such operation was a regular daily occurrence, up to six times daily, involving about half an hour's duration. The employers had clearly failed to carry out their statutory duty,[2] for goggles were not provided nor was there adequate notice of their availability. Nevertheless, the injured workman failed in his claim based on breach of statutory duty and it was only the late addition of a claim based on breach of the common law duty to provide a safe system that enabled him to succeed. This decision raises an interesting point in each of these fields.

The failure to succeed for breach of statutory duty may be said to follow somewhat unexpectedly from the application of the rule in *Bonnington Castings, Ltd.* v. *Wardlaw*.[3] This case marked a change in approach to the problem of proof of causation and placed the onus firmly on the plaintiff workman. Whilst adding to the task of the plaintiff it was felt that such a shift in onus would only be material in those cases where causation was doubtful owing to the presence of alternative possible causes. Such a case, *Watts* v. *Enfield Rolling Mills*[4] where the cause of the injury was uncertain illustrates the type of situation where the party upon whom the onus of proof was cast was bound to fail. The basic facts of *Nolan* are similar to those of *Watts* with the significant distinction that in *Nolan* the failure to provide goggles on the part of the employer was the only physical cause of the accident. The workman, however, in evidence said that even if goggles had been provided he would only have worn them under strict orders and supervision.[5] Paull J. considered that this admission affected the question of causation and that, on the facts before him, the onus on the plaintiff was not discharged for he had failed to show that on the balance of probabilities the safety device would have been used.

[1] [1958] 1 W.L.R. 936.
[2] s. 49, Factories Act, 1937, and Protection of Eyes Regulation, 1938, Reg. 1.
[3] [1956] A.C. 613. Noted in 19 M.L.R. (1956) 530.
[4] [1952] 1 All E.R. 1013.
[5] At p. 938.

This preoccupation with the onus of proof has had the effect of introducing into consideration a matter which can hardly be said to be relevant. The action is for breach of statutory duty where there has been a clear breach and any action on the part of the workman must be a joint cause of the injury to be dealt with under the rules of contributory negligence. There seems to be no possibility that, had the matter been so regarded, the presumptive conduct of the workman could have been taken as an act or omission on which to base a claim by the defendant that there had been contributory negligence.

The shift of the consideration of relative blame as between employer and workman has been moved, as a result of the rule in *Bonnington Castings, Ltd.* v. *Wardlaw*, to the initial question of sole causation from its former relation to proportion of damages to be borne by the employer. This has allowed the introduction of the theoretical question of what a workman might have done in other circumstances, a matter which formerly would have had no place. Given the present-day hostility of workmen to any safety device which is thought, rightly or wrongly, to interfere with work this evidence can also be impeached as being of far less than face value. Had the employer fulfilled his own duty the workman's attitude might well have changed, and the employer by his inaction is helping to foster the workman's attitude which will be used as a defence against him.

A further result of the approach adopted in *Nolan* can be seen where, for example, a workman's action is the main cause of the accident. It has been clear since *Lavender* v. *Diamints, Ltd.*[6] that so long as the breach of statutory duty by the employer is a contributory cause the workman must recover part of the damages suffered. If, however, the workman's contribution to the injury is considered first as a question of onus of proof, he will fail completely on this head.

The success of the plaintiff workman in *Nolan* consequent on the application of the common law duty of the employer to provide a safe system followed from the finding that there is a duty to provide both safety devices and supervision to a reasonable extent to ensure their use. Fairly recent cases have established beyond doubt the duty in the employer to instruct[7] and to give orders to use safety devices,[8] but the duty to go to reasonable lengths to persuade the competent workman to use safety devices and to see that he does so was only recently formulated in *Haynes* v. *Qualcast* (*Wolverhampton*).[9] The application of this rule serves to confirm the addition of a welcome extension of the employer's duty.

J. C. Wood.

[6] [1949] 1 K.B. 585.
[7] *Barlock* v. *Brighton Corporation* [1949] 1 K.B. 339.
[8] *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180.
[9] [1958] 1 W.L.R. 225.

## A New Court's First Judgment

The Restrictive Practices Court has given its first decision on a registered restrictive agreement.[1] The restrictive agreements of the Chemists' Federation have been declared to be against the public interest by the court, consisting on this occasion of its president, Devlin J., with Upjohn J. and Lord Cameron (all three dispensing with the traditional wigs and gowns), and four "lay" members, being persons appointed to the court as being "qualified by virtue of [their] knowledge of or experience in industry, commerce or public affairs" (in the language of the Restrictive Trade Practices Act, 1956, s. 4).

Since 1935 the federation, consisting of manufacturers and resellers of proprietary medicines, has practised a number of restrictions, the principal one of which required its manufacturers to distribute their proprietary medicines exclusively through qualified retail chemists. The court was not satisfied that this restriction, and others depending on or connected with it, could be brought within the protective scope of any of the seven "justifications" set out in section 21 (1) of the Act, and declared that they were therefore contrary to the public interest and hence void. The court refused, however, to grant the application of the Registrar of Restrictive Trading Agreements, the other party to the action, for an order restraining the federation or its members from giving effect to the restrictions which had been declared void. Its refusal was based largely on the grounds that the federation should be allowed to put its affairs in order without the threat of penalties for a possible breach of injunction, and that there was no evidence that the federation would continue with its restrictions. In fact, the federation decided to dissolve itself shortly after the court's decision.

The decision, though it has the importance of being the first, is itself of somewhat limited interest. The court did not find it necessary to go deeply into the construction of the crucial section 21 (1)[2];

[1] *Re Chemists' Federation Agreement (No. 2)* (1958) L.R. 1 R.P. 75.

[2] The court did, however, consider the meaning of the words "reasonably necessary" in s. 21 (1) (*a*)—"that the restriction is reasonably necessary . . . to protect the public against injury . . ." The court found the decision in *Stanford* v. *Roberts* ([1901] 1 Ch. 440) to be a helpful guide, and said:

> "We have to ask ourselves whether a reasonable and prudent man who is concerned to protect the public against injury would enforce this restriction if he could. He would not do so unless he was satisfied, first, that the restriction afforded an adequate protection, and, secondly, that the risk of injury was sufficiently great to warrant it" (p. 106).

The court did not refer, in its judgment, to two important arguments advanced on behalf of the Registrar. First, it was argued (at p. 85) that if it was necessary for the protection of the public that proprietary medicines be sold only by qualified chemists, "such protection should be afforded by legislation and not by restrictions by interested parties." It should be clear that if this line of argument were to be generalised, and accepted, then no restriction could be justified: every restriction agreed to by interested parties could, in principle, be introduced by legislation. The second point concerns the precise wording in s. 21 (1) of the seven grounds for the justification of a restriction.

and, since it concluded that none of the seven grounds of justification could be invoked successfully in defence of the restrictions, the court did not consider specifically (except incidentally, *e.g.*, at p. 107) the detriment of the restrictions to the interests of users of the goods or to actual or potential competitors. Moreover, one instance does not make a trend. For this reason it is less fruitful to discuss in detail the subject-matter of the decision than to select and examine two specific issues arising from the case.

The first issue is one which is likely to be of recurring interest, and concerns the nature of reasoning in economics and the place of "factual evidence." For the Chemists' Federation it was argued, *inter alia*, that the removal of the main restriction would divert some business from qualified chemists, and so cause a number of chemists to go out of business, notably in country districts. The court, however, was not satisfied that the removal of the restriction "would drive any appreciable number of chemists out of business." My concern here is not with the merits of the argument, but with the court's discussion of it. The court said, *inter alia*:

> "The evidence we have had is too nebulous to support that [the rejected] conclusion." "The extent to which there might be such a reduction as a result of increased competition had to be left to guesswork." "The federation did not succeed in lifting this point out of the realm of speculation." (pp. 109–110.)

Now, in general, it is difficult to see how any result springing from the removal of a restraint on competition can be arrived at without recourse to "speculation," since there can be no concrete evidence of fact bearing directly on the imagined situation in which the restraint is absent. Unless the court insists on an impossible standard of proof, in general it will have to consider the likely consequences of a restriction and of its removal, and, in so doing, it will be engaged, willy-nilly, in an exercise involving speculation about causal relationships, and in conjecture or guesswork. Sometimes the matter may be relatively simple; in some cases all competent observers may be agreed on the nature of a resultant change likely to come from an alteration in economic arrangements. Thus, in the present case, no one would argue, presumably, that the removal of the restriction would increase the number of chemists in business, and all would agree that the number would remain

These grounds refer, roughly, to seven types of result (approved by the legislature) which may conceivably derive from one or other registered restriction. In two of the seven paragraphs, *viz.*, (*e*) and (*f*), the formula, in effect, is: "the restriction *is likely* to produce a certain result." The words "is likely" are not included in the other five paragraphs. For the Registrar it was contended that this difference in terminology is significant and means that whereas, for (*e*) and (*f*), "it is sufficient to show that its [the restriction's] removal would be likely to produce the result," for the other cases the court must be satisfied that "its removal would in fact produce the result" (p. 94). This postulates two different standards of "proof"; the matter is connected with the first issue which is discussed in the text, above.

the same or decline. But even here, of course, a judgment of the extent of the change, if not its direction, would involve guesswork in the sense that it could not be deduced unequivocally from the observed facts of the situation. However, not all cases will be as simple as this. Sometimes competent and disinterested observers differ as to the nature and direction of change, and not only as to its likely extent. The relative effects of restraints on price competition and of their removal on the amount of effective industrial research provide an example of one such controversial issue in economics. In such issues the court will presumably have to choose between rival theories, and facts are likely to be decisive only in extreme limiting cases.[3]

It is not intended to suggest that the court is unaware of these general considerations. But the dicta which have been singled out for discussion here are not helpful. Perhaps this is because in the particular case the situation examined and the circumstances were such that the respondent's main argument could be, and was, refuted by reference to observed facts. The fact, for example, that many medicines, similar to those controlled by the federation, have for many years been sold by traders other than qualified chemists without injury to consumers, was in strong contradiction to the federation's main claim that its restrictions were necessary to protect the public. But it is suggested that on many matters, in the nature of things, "facts" cannot be conclusive; though this does not mean that "facts" are not likely to be helpful in guiding the necessary processes of "speculation" and responsible "guesswork."

The second point for brief comment refers to the role of the Registrar of Restrictive Trading Agreements in proceedings before the court. In the preliminary "application for directions" by the Registrar to the court,[4] the position of the Registrar *vis-à-vis* the court was considered by Devlin J. At p. 64 he said:

> "I think this might be said, that the registrar is not in the position of an ordinary litigant in this way, that he appears before the court in order to see that the court arrives at the right decision, and, if the documents which he has got in response to his inquiries are material to that, I imagine that he would be willing to accept that, in accordance with his duty, he ought to produce them. It is not like ordinary litigation in that respect. . . ."

Yet earlier he said (at p. 62)[5]:

> "The burden is put upon the federation to prove its case and the registrar is there to criticise it and to make such

[3] For example, where it is established that in a particular industry, which has a restrictive agreement, there is no expenditure on research, it could not be seriously claimed that the restriction increases the volume of research.

[4] Reported in *Re Chemists' Federation* (1958) L.R. 1 R.P. 43.

[5] A similar point is made at p. 63.

inquiries as he thinks right to see on what grounds it might be demolished. Why are you [the respondents] at a particular disadvantage if he only brings out the successful inquiries (as most litigants do) and not the unsuccessful ones? "

As the precise roles and duties of the Registrar, whether he is an ordinary litigant or something different, may conceivably be important for the adjudication of some cases, it is to be hoped that the court will clarify a position which at present has been left somewhat obscure.

B. S. Yamey.

## INDEX

We should like to call the attention of our readers to the Index, which has just been published. This covers the first twenty-one volumes of the *Review* and contains not only a general index, compiled on the general lines adopted for the *Law Quarterly Review*, but a list of contributors of articles, a list of Command Papers and Reports of Commissions and Committees discussed or noted in the *Review*, and tables of cases, statutes and statutory instruments.

The author is Mr. W. A. Steiner, LL.M., A.L.A., Barrister-at-law, who was for a number of years an assistant librarian at the British Library of Political and Economic Science, and the volume is 134 pages in length. It can be obtained from Messrs. Stevens & Sons, Ltd. at a price of 25s. net.

# REVIEWS

**Principles of the Law of Contract. By J. F. Wilson, m.a., Lecturer in Law, University College of Wales, Aberystwyth. [London: Sweet & Maxwell, Ltd. 1957. xxxvi and 517 and (index) 22 pp. 35s.]**

The kind of textbook chiefly used by undergraduates in British law faculties is largely the outcome of two influences. On the one hand there is the programme for legal scholarship, implicit in Blackstone's and Austin's work, that the jurist should state the principles of law which may be discerned by a process of generalisation behind the particularities of legislative and judicial rules.[1] On the other hand there is the educational theory that the student is not sufficiently equipped to digest the raw materials of the actual legal order: he will become confused if he tackles the complexities of the forensic process, and so there needs to be prepared for him a simplified account of the legal system. The writer thus prepares somewhat dogmatic restatements of "the law,"[2] providing explanation by reference to the judicial development of doctrines within the courts, and illustrations by reference to decided cases. Here and there some doubts about some rules of law, and some perplexities about some factual situations, appear to provide intellectual nourishment additional to that obtained through the assimilation of legal principles. The two influences are complementary. The student textbook can satisfy both objectives since both call merely for the author's pronouncement of what the law is. Consideration is not required of what the law ought to be, nor of the social realities which form the background of the law, nor of the practical realities which are involved in the actualities of litigation. There may be ignored not only philosophical and sociological treatment but also an account of the juristic theories of earlier textbook writers. Since the author states his conclusions as to legal principles he need not examine whether the judicial pronouncement of a particular doctrine forms part of a *ratio decidendi* or is but *obiter dictum*. Little discussion is needed of the weight to be given to a judgment in the light of the hierarchy of the courts: if what is required is an illustration of, rather than authority for, a legal principle, it is as well supplied by a case from the county court as from the House of Lords. Even with this mode of functioning new editions of textbooks are, nevertheless, called for with changes in the legal material. Forensic activity may create better illustrations of old principles or call for the statement of new principles. The legislative and judicial activity may be so great that it brings about such extensive departures from, or additions to, old principles that they cannot be satisfactorily incorporated within the framework of a book designed for those old principles. In that event an entirely new book is called for. Such a book is also required when it is thought that the inductions of previous writers have been wrong.

Mr. Wilson's book abundantly satisfies the criteria for the publication of a new students' textbook on the law of contract. There has been considerable

1 *Cf.* Holmes, *Path of the Law*. "The teaching of the decisions of the past are put into general propositions and gathered into textbooks. . . . Jurisprudence . . . is simply law in its most generalised past. Every effort to reduce a case to a rule is an effort of jurisprudence."

2 The need for social stability produces a social "myth" as to the existence of defined legal principles. This plays some part in the rationalisation of actual "law" by legal writers.

legislative and judicial activity in this field in recent years: he writes with lucidity, and has given independent consideration to the principles to be derived from these changes. Moreover, he has regrouped some of the traditional subject-matter of contract in order to exhibit the comprehensive character of one of the more recently developed, and still developing, principles of its law: "mistake" is subordinated on the one hand to "offer and acceptance," and on the other to "implied terms."

Wilson bases himself on the view of Anson that contract is restricted to "agreement." There is no consideration of the alternative view presented by Pollock, and eventually adopted in the American *Restatement*, that the promise is a better concept with which to build. On the other hand, whereas Anson laid almost all his stress on a common intention, Wilson states that "in general the law applies an objective test to the formation of contract."[3] However, unlike Lord Denning, he arrives at the objective test by the search for the "real intention" pursued in the light of the doctrine of quasi-estoppel stated by Blackburn J. in *Smith* v. *Hughes*. This doctrine, it will be recalled, was not considered by Anson as being inconsistent with Pothier's subjective theory. The discussion of the objective test is not, however, undertaken until after offer and acceptance and consideration have been dealt with: it is introduced when dealing with mistake. The traditional area of mistake is divided into three fields. In one of these the explanation why mistake in connection with a transaction prevents a contract from arising is that objectively considered there has not been offer and acceptance. In the second, the law applies a subjective test, but here again we are told that "there has never been a real acceptance of the offer." Since we are also told that in this field the law requires that the one contracting party be fully aware of the mistaken belief of the other it is difficult to see why an objective test is not considered as applying. Indeed, the decision in *Sowler* v. *Potter*, which is considered as coming within this field, is criticised because Mrs. Sowler had provided "no objective existence of attempting to safeguard herself."[4] In the first two fields consent is negatived by mistake, but in the third field is found the other branch of Lord Atkin's dictum in *Bell* v. *Lever*—the mistake nullifies consent. The nullification is effected by a term of the contract and so it has to be a common mistake. Wilson rejects the view that the nullifying effect of common mistake is limited to "the two cases of non-existence of the subject-matter and the failure to make title." It extends throughout the range of all situations where a term dealing with the mistake may be implied. The authority on which Wilson relies is the House of Lords case of *Bell* v. *Lever*. This, indeed, is the interpretation placed on *Bell* v. *Lever* by Lord Denning. It is true that in *Cheshire and Fifoot* Lord Denning is considered as a supporter of their view that "at common law a contract is

[3] It is amusing to reflect that thirty years ago references to subjectivity and objectivity in law were often regarded as introducing unnecessary metaphysical distinctions into a practical subject. *Cf.* the view that the distinction between the intellect and emotion is metaphysical: *per* Lord Goddard C.J. in *Spriggs* [1958] 1 All E.R. 300 at 304F.

[4] The opinion of the majority of commentators is that the decision in *Sowler* v. *Potter* cannot be supported even on the subjective theory enunciated by the judge. (Wilson's omission of a reference to Goodhart's discussion of the case in 57 L.Q.R., p. 228, is surprising. His citation of juristic literature is eclectic.) I personally agree with the decision, and support it on the objective theory. The basic principle is that an offer cannot be accepted by a person to whom it is not addressed. The identification of an offeree may be by reference to characteristics. A blind segregationist may make an offer to whites only, and this offer cannot be accepted in any circumstances by a negro. Sowler's offer was made, to Potter's knowledge, to a not-Robinson, and could not be accepted by Potter because she was a Robinson. No principle of law is involved in the determination of the precise terms of the offer: this is a "question of fact."

not void merely because the parties have made the same mistake however fundamental." But this overlooks what Lord Denning said in *Solle* v. *Butcher*. "The correct interpretation [of *Bell* v. *Lever Bros., Ltd.*] is that once a contract has been made, that is to say, once the parties, whatever their innermost state of minds, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it. . . ."[5] Lord Denning's contribution to the law is to insist that there is also an equitable doctrine of rescission for mistake, which carries with it a power of putting parties on terms. It is not clear whether he considers that this equitable power extends also to common law mistake, but there is no reason why it should be confined to the exclusive jurisdiction of equity.

One advantage of retaining the implied term basis for mistake is that Wilson is able to bring under one principle a number of branches of law not previously integrated. Within the doctrine of implied terms[6] he gathers common mistake and frustration, and also customary terms in general as well as the implied conditions of the Sale of Goods Act, which he rightly regards as statutory declaration of mercantile usage. He could also have added the topic of dependent and independent covenants. Simple analysis shows that the problem whether "covenants" are dependent can be resolved into the problem whether the performance of the promise of one part is a "condition" (in the sense of condition precedent) of the performance of the other part. Where there is no express provision to that effect, then the problem turns on whether a term to that effect can be implied.

The integrating process can be carried still further. Here are some examples of topics which, in the author's language, are left segmented. The ticket cases and the letter cases could be brought under the objective theory of consent. It is surprising to find that there is put forward as the basis

[5] [1949] 2 All E.R. 1107 at 1119B. In *F. E. Rose, Ltd.* v. *Wm. Pim, Ltd.* [1953] 2 All E.R. 739 at 747B, Lord Denning said: "Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends." There is no reason for thinking that he was excluding implied conditions from so operating. The case was one where according to the principles governing implied terms a condition could not be implied. The parties deliberately elected to use for the contract that they made in writing the English word "horsebeans" as the description of its subject-matter. They deliberately decided to exclude a reference to the French word "feveroles." It is also true that they assumed that the English and French words were synonymous, but they chose the English word because there had been difficulties about the precise significance of the French word. Thus to have implied a reference to "feveroles" would have been to make the contract speak when the parties had been intentionally silent. This would have contravened an established principle of the doctrine of implied terms. This "explanation" of the case is, it is submitted, but a free translation of the judgments of Singleton and Morris L.JJ.

The other case relied on in *Cheshire and Fifoot* for their view that the common law recognises no doctrine of common mistake is *Harrison and Jones, Ltd.* v. *Bunsten and Lancaster, Ltd.* [1953] 1 Q.B. 646. This case can also be explained in accordance with the theory that common mistake may operate to introduce an implied term into a contract. The term there suggested for implication was one which would have contradicted the express terms of the contract. It is contrary to the established principles of the doctrine of implied terms to permit this to be done.

[6] Wilson employs the phrase "terms implied by law" for one chapter heading and "terms by construction" for another. In the United States this terminology marks a distinction between terms deemed to exist by virtue of the presumed intention of the parties, and those imposed on the parties by the court's view of justice.

of the letter cases the fiction that the post office is an agent of the letter writers.[7] The principle of quasi-estoppel can embrace both the *Central Properties* type of case, and the waiver cases, which are illustrated by *Tyers* v. *Rosedale and Ferryhill Iron Co.* The problem of remoteness of damage in contract should be considered together with the same problem in tort.

An integrating process leads to greater depth of knowledge because, as the author states, it focuses attention on more fundamental principles. On the other hand, the inclusion within the covers of one book of quite independent topics gives but a simulacrum of integration, and leads to superficiality of treatment. Is there any need to include within a book on contract a discussion of either agency or quasi-contract? Those topics are concerned with quite different principles from the law of contract, which is a law of autonomy even if it be regarded as based on promise and not on agreement.[8]

It is to be hoped that in a second edition the author will be able to narrow the scope and deepen the treatment. He should be able to incorporate some reference to the major juristic work of Williston and Corbin, work which is bound ultimately to affect judicial development here, as it already has in the United States, either directly or through the American *Restatement*. Further reference to the literature in periodicals could also be useful. Such literature sometimes contains the best discussion of policies behind principles. The need for consideration of policies does not solely arise from the task of the university teacher to expound the reason for rules, but also from the fact that in practice it is the purposes which rules subserve which are often determinative of judicial decisions.

J. L. Montrose.

## A Casebook on Contract. By J. C. Smith, m.a., ll.b., Head of the Law Department, University of Nottingham, and J. A. C. Thomas, m.a., ll.b., Douglas Professor of Civil Law, University of Glasgow. [London: Sweet & Maxwell, Ltd. 1957. xxii and 483 and (index) 5 pp. £2 5s. 0d.]

One needs to "audit" but a few case method classes to confirm the conjecture that the case book imposes no very great restriction on the teacher. It is but a tool of his trade and he is the craftsman who uses it for his own purpose, a weapon in his fight for education in law or justice or truth or reason or merely education, or whatever objective he sets before himself. He may make much or little of the book: there is no one case book method, any more than there is one lecture method. The flexibility of the "system" can be seen by considering the extremes between which the thousand and one methods may be said to fall. There are instructors who give straightforward lectures on the subject-matter of the texts in the assignment from the case book, using the cases to illustrate the principles expounded. There are instructors who ask questions and propound problems barely hinted at within the covers of a very ample case book, regarding its texts as adequate education in the problems it considers. The comments which I make about a case book must reflect my lack of imagination as to how it may be used.

[7] This theory had been rejected even before *Henthorn* v. *Fraser*. The objective theory suggests the doctrine that an offer may be sent by post in circumstances which lead the offeree to believe that acceptance is complete as soon as a letter of acceptance is dispatched by post, without any need for express notification.

[8] "Agreement" and "agreements" may signify distinct notions. "Agreements" refers to bipartite transactions, but we may speak of a unilateral promise as based on the agreement of the promisor. In quasi-contract obligations are imposed despite the will of the obligee, and in agency one person becomes bound to a party to whom he has made no promise.

It is, nevertheless, possible to isolate the contents of a case book from its potential use, estimating the impact of the book on an uninstructed student reading it apart from class discussions. The wide range of the spectrum of legal education in the United States is produced, in part, by the variety of case books as well as by the diverse uses to which they are put. Much has happened since case books contained but a selection of cases transcribed from the law reports, with but the headnotes excised, and used because it was thought that cases were where alone "law" was found, furnishing the particulars from which the general principles were to be derived by a process of "logical" induction. Materials of all kinds other than cases have been added, as well as questions and problems. The case book has become the stimulus for a "Socratic dialogue" between teacher and student in which the "nature and sources of law" may sometimes be discussed in terms of social interests and ideals, and decisions considered not as application of rules but as a resolution of forces. The preparation of a case book is no mere "tonsorial and agglutinative" task: it may be a major contribution to scholarship, the selection of materials being so made as to exhibit not only the views of judges and other jurists, but also the author's own theses, which he may expound in introductory or explanatory texts written by himself. Thus a recent United States case book in the law of contract presents a sociological approach, inviting consideration of the policies lying behind the decisions of the courts.[1] Its chapter headings speak of "contract and the free enterprise system," of "regulation and collective bargaining," of "fairness and equality and exchange justice," of "the ideal of security of transactions." Its basic material is largely the familiar material of contract law cases: it is the point of view which is different. What is the point of view of "Smith and Thomas"?

If we look at the chapter headings we shall find them dealing with traditional concepts, though, as we shall see, there are important rearrangements of subject-matter indicating the existence of principles not fully recognised a generation ago. The outlook is, however, that of English analytical jurisprudence, including, however, the elements of growth and change in law. The impression I receive is that of a demonstration of a process of development and elaboration of a consistent set of principles, capable of regulating those arrangements of citizens resulting from the expression of their will as to their future activities, the principles themselves expressing canons of individual justice reflecting the wills of the parties.[2] That there are principles creative of rules seems implicit. The material serves as the empirical basis for a Kantian rational critique rather than for a Hegelian dialectic of decision born amid a clash of opposites, creating both doubt and turbulence. There is strife between litigants, though the arguments of counsel are almost suppressed,[3] but the material is not so spotlighted that there stands out the conflict of diverse interests of men in society, or that competition of principles which though opposed yet persist in law as in life.[4] We are not presented with a clash of judicial personalities, even in the "de-psychologised" form of a contrast between the judge as man of valour and the judge as man of caution: there is indeed little emphasis on dissenting judgments or conflicting cases.[5] But the book is an exciting presentation of

1 (1953) Sharp and Kessler: *Contracts: Cases and Materials.*

2 As we shall see, the topic of illegality is excluded from the case book.

3 A notable exception to this is the text of *Scott* v. *Littledale* where substantially only the argument of counsel is presented.

4 The competition of opposing principles in life is witnessed by the contradictions between popular proverbs: "Many hands make light work" is answered by "Too many cooks spoil the broth"; "Look before you leap" by "He who hesitates is lost."

5 Some of the dissents and conflicts refer to differences about "fact" rather than "law." The vital distinction between a question of law and a question

contract law. It is exciting not merely because it is the first appearance of a case book written by British teachers for use in the case method—not a case book giving in convenient form the cases which illustrate principles expounded in a textbook, but a case book which in itself provides the material for derivation of principles—it is exciting because of the nature of the material presented and because of the manner of presentation with its suggestion of principles.

The material presented consists mainly in cases, but there is also an extensive, though judicious, selection of extracts from a wide range of textbooks and articles. Their range, and the learning of the authors, is shown by the inclusion of an extract from Glanville Williams' article on "Language and the Law," and an extract from an article by a philosopher in *Mind*. The number of cases is high since many are summarised. The reading of an entire case is often a roundabout way of getting at the relevant point which may be made in a brief extract. Yet it is a most valuable exercise, both in developing general intelligence and acquiring the particular skill of a lawyer's technique. Compilers of case books are presented with the dilemma of completeness of individual cases on the one hand and compendiousness of relevant material on the other. Our authors have been prepared to lose on the roundabouts by giving summaries of cases in order to gain on the swings of judicial opinions. Their avowed purpose is to provide more material for discussion. It must be emphasised that though it may be judged that the authors present their texts as the basis for the formulation of a set of consistent materials, it is clear that they do not consider that teaching and study consist in dogmatic assertion and passive absorption. They restrict with austerity their own introductions and commentaries: there is barely a dozen pages of their own writing. But they are concentrated stimulation: as are the problems and questions that they have added with so much thought. They have throughout provided the stimulus for vigorous discussion by students of principles to be elicited, and it is discussion which is the life-blood of the case method. This blood is often thinned out by pressures to "cover a course." To avoid this, the authors have wisely made no attempt to include all the topics often found in books on contracts: their writ of prohibition extends well beyond the alien elements of agency and quasi-contract.[6] It is open to doubt, however, whether the exclusion of illegality is desirable. The exclusion is quite consistent with the author's purpose: but should not a

of application of law to fact has too often been overlooked in English legal thought, though it was stressed by Austin. The point may be illustrated by reference to the American case of *Sherwood* v. *Walker* as presented by the authors. In the belief that a cow was barren it was sold for a price one-tenth of what would have been obtained for a breeding cow. The majority through Morse J. rejected the buyer's action for replevin on the ground of mutual mistake; the dissent of Sherwood would have allowed it. The authors propound the question: "Do you think an English court would have agreed with Morse J. or Sherwood J.?" But, as the fuller report of the case shows, the majority and minority did not differ on the law: both accepted the doctrine of mutual mistake as expounded by Blackburn J. in *Kennedy's* case, but both answered differently his question whether the mistake was "as to the substance of the whole contract." The difference was similar to that between majority and minority in *Bell* v. *Lever*. *Stare decisis* does not extend beyond determination of law to application of law to fact or to finding of fact. An English judge would be perfectly free to decide a question of application of law to fact, similar to that in *Sherwood* v. *Walker*, as seemed to him right. Our authors are, of course, not alone in leaving discussion of the English doctrine of precedent to textbooks of jurisprudence.

[6] *Heilbut* v. *Buckleton*, *Pym* v. *Campbell*, *De Lassale* v. *Guildford*, are included, but it would appear that they are not intended to introduce the topic of "parol evidence and written contracts." It is doubtful in this latter connection whether it is worthwhile including the text on the Statute of Frauds.

student of contract be made to consider the relation between "contract" and political and economic democracy: and how far those are justified who see contract as the basic institution not only of a *laissez-faire* political ideology, but of all society?[7]

Perhaps the most important feature of the material presented by the authors is the use of American cases and texts. Our authors have properly acknowledged the debt of the common law world to Williston and Corbin and to all who laboured in the formulation of the *Restatement*: they have well demonstrated the great gain to English students to be obtained by the use of United States material. Indeed my complaint is that there should have been more! A few illustrations must suffice. A very brief account in nine lines is given of the *Allegheny College* case. A fuller account would have shown how the doctrine of "promissory estoppel" was favoured both by the court and by the dissenting judges, but that in the majority opinion the doctrine of consideration was found flexible enough to deal adequately with the case. A reference to Corbin's comment on the case[8] would have shown that the judgment of the court has been criticised as laying down too rigid a view of the doctrine of consideration. Moreover, such material would have helped to show the practical importance of considering a contract as a set of promises, which is the authors' approach to the subject. On the other hand, it would have helped discussion of the objective theory of agreement, which is a prominent feature of the book, to have included the vigorous criticism of some statements of that theory which is made by Frank J., when dissenting in *Ricketts* v. *Pennsylvania Rly. Co.*[9]: it would also have introduced English students to a novel style of judicial writing.

It is in the treatment of "conditions" that the authors' text calls most for amplification from further United States material, despite the fact that it contains so much of that material. They quote at some length the passage from Williston which contains his condemnation of the "astonishing use" in England of the word "condition" as meaning a certain kind of promise. This passage, curiously, is separated by an entire chapter from the section of the *Restatement* adopting the terminology whereby the word "condition" is distinguished from a promise.[10] But they do not present cases which drive home the point by judicial recognition of the importance of distinguishing "condition" from promise. *Lach* v. *Cahill*[11] contains an express dictum on the very point, and *U.S.* v. *O'Brien*,[12] in the Supreme Court, has a judgment by Holmes J. dealing with a cancellation clause, and showing that the happening of the events giving one contracting party the right to cancel does not necessarily constitute a breach of promise by the other contracting party: the subject-matter of the cancellation clause is part of a "condition," not part of a promise. Of course, there are English cases which could be used for discussion of this matter: the cancellation clauses of shipping contracts and the rejection clauses in contracts for the sale of goods are best expounded by the use of this distinction, but the judicial treatment labours under the handicap of the English terminology. The very case, which as a result of Serjeant

7 The "freedom of contract" clause in the U.S. Bill of Rights makes the American student aware of the relation between contracts and public law.

8 "Cardozo and the Law of Contracts," 52 H.L.R. at p. 417. A vigorous statement of thesis that consideration is not tied to a bargained-for detriment or to any other simple factor is contained in Clarence Morris: *How Lawyers Think* at p. 100.

9 153 F. 2d 757. (The opinion of the court was written by Learned Hand J.)

10 The *Restatement* does, however, unwisely in my opinion, define "promise" in accordance with Holmes' view so that it is possible to say that A promises it will rain tomorrow. I would prefer a terminology whereby one has to say A promises to make compensation if it rains tomorrow.

11 (1951) 138 Conn. 418.

12 (1911) 220 U.S. 321.

Williams' note is largely the origin of the English confusion, could be used to introduce the American distinction. In *Pordage* v. *Cole* the difference between *performance* being a condition precedent and a promise to perform is made by reference to the situation where the act of one party is a condition precedent to performance by the other, even though the former has made no promise to do the act. The questions asked by the authors about the possibilities of counter-claims in *Bettini* v. *Gye* and *Poussard* v. *Spiers* may agitate the question: an impressario may have a right to cancel an artist's contract for non-appearance by a certain date without the artist having promised to appear by that date. But the cases suggest an answer by reference to personal incapacity: and *Behn* v. *Burness* could bring out the distinction better.

The authors rightly associate the puzzlement of Devlin J. in *Smeaton, Hanscomb & Sons, Ltd.* v. *Sassoon I. Setty, Son & Co.* with the problem of distinguishing promise from "condition." But it is strange that earlier cases on the same point have been overlooked in English writing. *Beck* v. *Symanowski*[13] is a House of Lords case. In *Myer, Ltd.* v. *Osakeyhtio, Ltd.*[14] and in *Green* v. *Arcos*[15] Greer L.J. and Rowlatt J. specifically question the range of application of rejection clauses. The wise handling of both rejection clauses and exemption clauses, like those from *Wallis* v. *Pratt* to *L'Estrange* v. *Graucob*,[16] calls for clear recognition of the distinction between promises and conditions, and for the distinction between definitive qualities which appear in promises, and non-definitive qualities which appear in conditions or warranties, or may be non-contractual.[17]

The authors' rearrangement of much of the subject-matter of contract law marks a contribution to legal theory. The doctrine of consideration is linked with privity of contract, and in the part devoted to "the nature and extent of contractual obligations" we have as chapter headings (a) conditions, (b) implied terms, (c) initial impossibility and mistake, and (d) subsequent impossibility and frustration.[18] The dominant feature of the rearrangement is perhaps seen at the outset of the book in the chapter entitled "Contract, promise and agreement," for the first cases are those which are associated with "mistake" and which have hitherto appeared much later in the exposition of the law. In their brief introduction the authors accept Pollock's concept of a contract as a set of promises, which is, of course, also the approach of the American *Restatement*. However, attention is not directed to the difference between this approach and Anson's, which equated contract with agreement.[19] On the contrary, we are told that promises are only enforced if they are "bargained for," and so promise and agreement, if separated conceptually, are historically related.[20]

[13] [1924] A.C. 43.
[14] 37 Ll.L.Rep. 212.
[15] 39 Ll.L.Rep. 84.
[16] The authors set out an extract from the 8th edition of Benjamin on *Sale* without giving the editor's name. That extract contains a dubious equation of "description," in the phrase "sale by description," with definitive qualities.
[17] The function of rejection clauses is to restrict the operation of references to non-definitive qualities to "warranties": the function of exemption clauses is to deny them contractual operation. Neither extends, however, to references to definitive qualities which appear in the promise to deliver the defined goods: see 15 Can.B.R. p. 760, which should be read in conjunction with 15 Can.B.R. p. 309.
[18] Despite the title there is no suggestion in the text of a distinction recognised by some U.S. authorities between impossibility and frustration whereby they are regarded as governed by different principles.
[19] It would be most useful if the authors were to include in their next edition Landon's valuable, but not easily accessible, article on the scope of contract in the *Bell Yard*.
[20] Hamson would make enforceable promise logically part of the one reality which is bargain (*Case Book*, p. 39). His equation of consideration, offer,

We are directed at once to the nature of agreement, and the *Restatement* is paraphrased in the expressive phrase "it is the expression of agreement and not the agreement itself which makes a contract." Their opening cases are thus cases demonstrating the objective character of "agreement" in contract, and the "mistake" cases are excellent material for this purpose. But are not the "letter" cases and the "ticket" cases also related to the objective theory? And is not *Felthouse* v. *Bindley* perhaps the best illustration?

Those who support the introduction of the case method into the law schools of Britain, at least as an experiment, are indeed fortunate that the first of the books presented for this purpose is the one prepared with such judgment, skill and authority by Smith and Thomas. And all students of law, traditionalists and experimentalists, teachers and practitioners, will find much of novelty, interest and stimulus in what is not merely an educational tool but a true and memorable anthology of the literature of contract law.

J. L. Montrose.

## The Legality of Nuclear Weapons. By Georg Schwarzenberger, ph.d., dr. jur. [London: Stevens & Sons, Ltd. 1958. 61 pp. Paper edition, 3s. 6d. net. Cloth edition, 10s. net.]

In what was originally a lecture delivered at University College, London, Dr. Schwarzenberger offers a clear and dispassionate analysis of the legality of nuclear weapons, though at times he is forced into the realms of conjecture.

The truth is that there are no precise rules of law specifically related to the making and using of nuclear weapons and so we are left with the task of deducing relevant rules from general principles and specific rules regarding analogous methods of warfare. The insuperable difficulty here is that the lawyer is not sufficiently equipped to give answers to the many problems posed since he does not have the knowledge of the physicist or military strategist whose expert evidence is so obviously necessary before adequate deductions and analogies can be made.

Dr. Schwarzenberger dismisses considerations of humanity and the requirements of civilisation as being "no substitute for prohibitive rules of international law" (p. 47) and in themselves constituting no evidence of rules prohibiting the use of nuclear weapons. Quite rightly he further notes the gradual whittling down of the principle of the exemption of the civilian population from being an intentional object of warfare and concludes that the local population is only immune if the civilians are not connected with the war effort and are remote from important target areas (p. 48). Of course it is open to argument that a labourer in a canning factory is helping the war effort, and a further difficulty arises in judging the degree of remoteness and the relative importance of target areas to ascertain whether a State has broken the rules of the game and devastated an "excluded" area.

The rules that can be deduced and logically applied to the use of the "ultimate weapon" are the traditional rules regarding the legality of war itself and the more particular prohibitions such as those established by the Genocide Convention.

It is possible however to deduce further arguments against the legality of unclean bombs on the ground that the use of poisoned weapons is prohibited

acceptance, appears to be adopted by Smith, who analyses offer in terms of promise and request (*Case Book*, p. 39). But this analysis may be doubted: an offer is a statement of all the terms of a proposed contract: there is an expression of a willingness to be bound by the mere "acceptance" of the offeree: but why must there be a "request" for acceptance?

as also are gas warfare and weapons calculated to cause unnecessary suffering (see Article 23 of the Hague Regulations of 1899 and 1907 on Land Warfare and the Geneva Protocol on Poisonous Gases and Analogous Materials, 1925).

Once Dr. Schwarzenberger is forced to conclude that the manufacture of nuclear weapons is in itself legal then any further speculation must to a large extent be academic since as yet there remains no possibility of enforcing any rules in the event of a nuclear war. While subsequent punishment of the offenders may supply a rather doubtful compensation for the savagery of a nuclear war even that is subject to an exceedingly dubious presumption that the guilty parties remain to bear the reckoning. In any case punishment would be confined to individuals or States on the losing side.

This short work will supply food for thought for lawyer and layman. Not only the brevity of the work but its clarity and the author's intelligent and sober approach to the subject make it a work which one has no hesitation in recommending.

J. A. Andrews.

International Relations. The World Community in Transition. By N. D. Palmer and Howard C. Perkins. Published under the auspices of The London Institute of World Affairs. Second edition. [London. 1957. xxxvi and 870 pp. £2 10s.]

The authors of this book describe the purpose of the study of international relations as follows (p. XXXIII): "It is not a science with which we solve the problems of international life. At its best it is an objective and systematic approach to those problems."

This reviewer heartily agrees with the definition. The study of international affairs, if approached scientifically, helps us to understand complex interstate problems, and it teaches us to think soberly about these matters which concern us deeply, so deeply indeed, that the ability to form a sober judgment on them may become a matter of life and death for each of us. In this sense everyone ought to be a student of international affairs.

It is the task of the scholar of international relations, however, to determine the right *method* (or methods, for various roads may lead to the desired goal) for studying international relations. Opinions still differ widely on this point. Some scholars, among whom are Q. Wright and E. Haas, seem to favour a deductive and more theoretical-sociological approach, others, among whom are the authors of the book in review, a more empirical one.

Palmer and Perkins have built this book around a central theme: the State, its capacities and interests, and the means to promote these interests. No State is, or ever has been, wholly free in pursuing its interests, for each one of its actions provokes counter-actions or reactions from one or more other States. The third part of the book therefore deals with the "controls of interstate relations." The fourth part describes the history of international relations of the last decade and their present status.

Each of these sections is worked out in great detail with an abundance of historical examples. Thus, the book has grown into an encyclopedia of facts and considerations on international politics.

Is this method of presentation the best possible one for the student, particularly for the young undergraduate? Personally, I do not consider the abundance of historical detail an asset, but a burden for the student. Young people do not possess the profound knowledge of, and insight into, history which permits them to view the innumerable facts mentioned here in their proper perspective. They can not possibly "digest" the masses of material contained in each single chapter. And what can be the use of having

the student study some of the chapters while leaving the others aside? What he wants and needs is an overall picture of international relations.

Moreover, the authors of such an encyclopedic volume run the risk of making many mistakes in describing details and of resorting to commonplace statements in those sections where a fuller presentation would require hundreds of introductory pages. I pick a few examples at random:

P. 498. The "pancha-sila," the five principles of Indonesian nationalism, were not formulated by Dr. Hatta on October 7, 1945, but by Mr. Sukarno on June 1, 1945, in a speech delivered before Japan's surrender. The "extensive military operations" of the Dutch were not undertaken *before* the conclusion of the Lingadjati-agreement, but several months after it (first "police-action") and again in 1948, a year and a half later.

On the same page Indonesia is referred to as the "rich island of the East Indies." Fifteen years ago I published a book in English (with the Harvard University Press) in which it was shown once more (many others had done it before me) that Indonesia is not a naturally *rich* country. The commonly used indication "islands of fabulous wealth," stems from the Greek geographer Ptolemy who knew next to nothing about the real state of affairs. The chapter on Africa is full of similar half-truths.

Was General Hertzog really "the founder of white South African nationalism" (p. 570)? And was Hertzog really inspired by a "hatred of the Africans," a "hatred, unknown to Smuts"? The real roots of South Africa's nationalism remain unexplored here. Do the authors really believe that John Gunther's statement: "If I were an African, I would rather live in a British territory than in any other" bears any relationship to the real sentiment of the black Africans?

Here, my objections to platitudinous statements touch upon a principle, a question much more important than the small mistakes which will occur to any author who must write on so vast a subject. Is the use of books like those of Gunther, a proliferous writer who by now has been "Inside" nearly everywhere, to be recommended to students who must be educated in sober and non-emotional thinking about international affairs? One of the main concerns of the authors of a textbook on international relations must be to select recommended literature most carefully, for each book the student reads will be an example to him how people who know so much more than he does handle the subject.

The "multa" has won out over the "multum" in the book of Palmer and Perkins, which is most regrettable, for the authors have done their best to do a good job and in many aspects they have succeeded in doing so.

B. H. M. Vlekke.

## Yearbook of the International Law Commission 1951. Vol. 1. United Nations. [New York: United Nations; London: H.M.S.O. vii and 450 pp. 32s.]

The first volume of the 1951 *Yearbook* contains the summary records of the third session of the International Law Commission. As usual, the session opened with far from a full complement of members present. In fact, no less than seven of the fifteen members were absent at the beginning of the session, including the Chairman, whose arrival had been delayed. Although the session opened on May 16, a fact that had been known for some time in advance, the Commission was informed that Sir Benegal Rao hoped to attend from the 21st and that Professor Hudson would be leaving the United States on the 24th. Professor Koretsky was unable to leave the Soviet Union on health grounds, but he asked to have the documentation and records sent to him. When the session opened there was no news of Professor Zourek, but on July 23 the Chairman announced that a communication had been received

expressing his inability to participate in the third session because of "unexpected calls on his time and urgent work"—he had likewise been absent from the first and second sessions of the Commission. Of far more importance than these absences was that of Mr. el Khouri of Syria, who had informed the representative of the Secretary-General "that the incidents which had occurred between Syria and Israel compelled him to remain in New York, where the Security Council was sitting, but that he hoped to join the Commission on May 21."

The explanation of Mr. el Khouri's absence raises the fundamental problem of incompatibilities. Unlike the Statute of the International Court of Justice, that of the Commission makes no provision for ineligibility on the basis of office. At this session the Commission resolved that, in the event of it becoming a full-time body, its statute should be amended to provide that "no member of the Commission may exercise any political or administrative function, or engage in any other occupation of a professional nature." When this recommendation came to be discussed by the General Assembly at its sixth session it was felt that there was still insufficient experience of the working of the Commission to warrant any change being made at that time. Even though the Commission has now been operating ten years, the position is still the same.

One of the most interesting topics considered by the Commission arose from a report presented by Brierly on the law of treaties. Rejecting the practice of the Organisation of American States, and differing from the advisory opinion of the World Court on *Reservations to the Genocide Convention,* the Commission felt that to become effective a reservation required the consent of all parties to the convention, and that the principle applied by the Court of compatibility with the purpose of the convention was too vague and subjective to permit of general application. In the result, therefore, the Commission supported the practice of the Secretary-General—that all parties must concur—which had led to the request for the advisory opinion on the Genocide Convention.

This was one of the early sessions of the Commission which discussed the régime of the high seas and in which the beginnings of the report which was considered at the Geneva Conference of 1958 were laid. The Commission defined the continental shelf by reference to the possibility of exploitation, rejecting the geological concept and making no mention of depth. In this, it was more logical than the 1958 Conference which attempted to marry both concepts. Another issue on which there is a discrepancy between the Commission's views in 1951 and the Conference relates to the conservation of the resources of the high seas. Both bodies were of opinion that a coastal State, even though its nationals did not participate in the fishery adjacent to it, should participate in the regulation of the fishery. On this occasion it was the Commission which introduced a geographical limit at 100 miles. The Conference, on the other hand, referred merely to the resources "in any area of the high seas adjacent" to the territorial sea. Finally, the Commission dealt with the question of "hovering legislation" within the contiguous zone and was of opinion that this should not extend more than twelve miles from the coast. The Commission intentionally measured from the coast rather than the outer limit of the territorial sea because of the inability to secure unanimity as to the limits of the territorial sea. Although the Commission pointed out that States which have claimed extensive territorial seas have less need for a contiguous zone than those that have been more modest, it may be argued that this reference to twelve miles from the coast indicates the predilection of the majority of the Commission for a territorial sea less than twelve miles in extent.

Other matters considered by the Commission related to the definition of aggression and the formulation of a draft code of offences against the peace and security of mankind. The Commission was unable to find a suitable

general definition of aggression, although it had felt that any definition should include such indirect forms of aggression as the fomenting of civil strife, the arming of organised bands for offensive purposes or the sending of "volunteers." On the other hand, it was able to adopt in the Code of Offences a section which provided that such an offence included aggression, a threat to resort to aggression, preparations for the employment of armed force, incursion by armed bands for political purposes, encouragement or toleration of activities to foment civil strife or terrorist activities, and an extensive list of other similar acts. One might have felt that if it was impossible or inadvisable to define aggression, it was likewise the case in connection with this draft. It is clear, however, that the draft's list of offences would not preclude acts taken by way of legitimate preventive self-defence.

In view of the fact that the Commission is not a full-time body and meets only for a few weeks each year, it might be thought advantageous if, instead of devoting its energies to a wide field of studies, each session were confined to just one or, at most, two topics only. Further, States might be asked to ensure that members of the Commission are not engaged on State affairs when they are supposed to be at the deliberations of the Commission, while the members might be asked to consider their task as members of the Commission as taking precedence over all other activities.

L. C. Green.

## Studies in Jurisprudence and Criminal Theory. By Jerome Hall, Distinguished Service Professor of Law, Indiana University. [New York: Oceana Publications, Inc. 1958. 300 pp. 45s.]

This is a collection of the author's articles and addresses, including three that have not before been published. There is a long essay on Plato's legal philosophy, and a survey of schools of jurisprudence culminating in the author's proposal for an "integrative jurisprudence." He argues for the unification of political and legal theory, and the provision of separate definitions of "law" according to the principal contexts in which the word is used. Perhaps the most valuable chapter is the long study of causation in the middle of the book, which serves as a bridge between the author's two fields of interest. Professor Hall sets out his own theory of causation, with special reference to the criminal law, and then adds a persuasive critique of the well-known study of Hart and Honoré. There are many signs that Professor Jerome Hall is in fighting fettle, not least in the first chapter where he criticises Dr. Williams's approach to the definition of crime. This is not a chapter to which the reviewer will be expected to give unqualified praise, and since a book review is not a proper place for continuing a controversy, it may be sufficient to say merely that the "moralist" view of crime is ably argued.

The other notable chapter is the last; perhaps the author would himself not object to its being characterised as a defence of his die-hard position on the M'Naughten rules, which led to his disagreement with his colleagues in the American Law Institute on the drafting of the Model Penal Code. In brief, the author defends the concept of criminal responsibility in its traditional connotation, claims that most psychiatrists now reject the notion of "irresistible impulse," and defends the "knowledge of wrong" test of the M'Naughten rules. Although he proposes a "substitute" for these rules, the substitute is little more than a rewording. The position is further developed in other articles not reprinted in the present volume, namely a joint review with Karl Menninger in (1953) 38 *Iowa Law Review* 687, and an article in (1956) 42 *American Bar Association Journal* 917. In brief, the argument is that the M'Naughten rules, properly interpreted in the light of modern psychiatry, are adequate for the purpose of giving exemption to the truly insane. The first

wing of these rules—the accused's knowledge of the "nature and quality of the act he was doing"—is, Professor Hall thinks, "an ordinary way of specifying what, in part at least, is meant by the psychiatrist's 'reality principle.' It is a plain way of defining an elementary criterion of rationality, simply stating the truism that a rational person is a sane person." The first of these sentences contains the qualification "in part at least"; the second does not, and therein lies the fallacy of Professor Hall's argument. When M'Naughten shot at Mr. Drummond, he knew what he was doing, and so was not protected under the first wing of the rules, even though he was a paranoiac whose power of reasoning was grossly warped, and who was insane on any view of the reality principle.

Professor Hall seems to assume that the M'Naughten rules give a defence in all cases of "disordered intelligence." But this is not so, for under the rules the disorder must be logically connected with the act for which the accused is charged. The new formulation of the rule proposed by the author does not seem to widen the traditional attitude to "logically irrelevant" delusions. There is another way, however, in which the author's interpretation of the M'Naughten rules would give them a substantially greater scope. He contends that even when a psychotic pays lip service to common principles of right and wrong, that provides no support of assertions that the psychotic understands moral obligations in the way in which normal persons understand them; the psychotic who is subject to "dissociation" may coldly recognise the immorality of conduct, but his intellectual judgment is not permeated with feeling. It seems a somewhat unusual use of language to introduce feeling into the concept of understanding; and the effect of doing so seems to be to extend the right-and-wrong test so widely as almost to make irresponsibility co-extensive with insanity—an interpretation of the law against which Professor Hall most vehemently contends.

Glanville Williams.

## The Sentence on the Guilty. By Claud Mullins. With an Introduction by the Rt. Hon Viscount Templewood, g.c.s.i., g.b.c. [Chichester, Sussex: Justice of the Peace, Ltd. 1957. xiv and 70 pp. (including index). 9s. 6d.]

It is some years now since Mr. Claud Mullins sat in the London courts as a Metropolitan magistrate. His courageous and sympathetic methods of dealing with those who appeared before him became well known, and Viscount Templewood in his Introduction to this little book by Mr. Mullins pays a fitting tribute to the author's very original mind and the tireless energy he has devoted to questions of penal treatment. Upon his retirement Mr. Mullins continued to interest himself in these questions, and he became aware of the need for the present book on the subject of sentencing as a result of talks which he has given to magistrates in many parts of the country during the last few years, mostly under the auspices of the Magistrates' Association. Although the book has been written primarily for magistrates, it should achieve a wider audience among those who have to sentence offenders in the higher courts and among the police and probation officers.

Mr. Mullins believes that the subject of sentencing is of vital importance, because what is done at this stage "must have a powerful influence for good or evil in the future lives of offenders. A wise handling and a sound sentence may result in turning an offender away from crime. Unwise sentimentality or excessive severity can both act as an urge to further criminal actions." Success in this matter of sentencing requires a careful study of the various alternatives at the disposal of the courts. The book gives a brief chapter to each of these, in which the provisions of the law are carefully explained and the author gives us the fruit of his wide experience.

In some ways this is a timely book, which goes part of the way towards filling a gap in the literature. Increasing attention is being focused on the sentencing policy of the courts by criminologists, and the Streatfeild Committee on the business of the criminal courts is expressly enjoined in its remit to consider the ways in which the courts are informed about the offender at this vital stage. The importance of taking time over the choice of the sentence is rightly stressed by the author, though while the courts remain unreformed and the lists get longer, this seems a counsel of perfection. If a case before the higher courts is remanded for a report, it is difficult to arrange that the same judge who orders the report shall receive it, and yet it is of cardinal importance to ensure that the court which tries the case shall decide the sentence. The provisions of the Criminal Justice Act, 1948, which allow magistrates' courts to commit to quarter sessions for sentence have been criticised on this score. Even in the magistrates' courts, the same bench may not be available on consecutive occasions to receive any report which is ordered. Clearly these are important aspects of the administration of justice. Mr. Mullins is very well aware of these difficulties, and in his earlier book *Crime and Psychology* he suggested a solution to the problem for the higher courts, while in this book he shows how magistrates' courts have the remedy in their own hands.

The role of the probation officer is very clearly explained, and the question what should be included in his report is carefully considered. It is not for him to tell the court what to do, of course, but Lord Goddard, at the annual meeting of the Magistrates' Association in October, 1956, supported the view that, when asked, probation officers should be free to say what punishment was appropriate for the offender in question. A recent outburst by a learned deputy chairman of quarter sessions over a report from a prison governor, which stated that a person was not suitable for Borstal training, on the ground that this was a matter for the court to decide, shows that there is still a gulf that separates courts and administrators, which it is submitted must be bridged before a satisfactory sentencing policy can be developed.

Probation, Mr. Mullins stoutly maintains, is not a let-off, and may well involve "a great invasion of personal liberty." He is all in favour of this method of disposition, because it gives the court so much discretion in dealing with the offender. Conditions may be imposed, including a condition that the probationer shall attend for medical treatment, and in the event of failure, the court still has a free hand, which the system of suspended sentence does not allow, in deciding what course to adopt.

The growing importance of the fine as a method of disposition is hardly reflected in the amount of space devoted to it by the author (less than six pages). One suspects that he harbours some degree of prejudice against this most important instrument of correction. The reasons are not far to seek. Wide variations in fines for similar offences between different courts or even the same court on different occasions hardly inspire confidence, and the maximum permitted by law is often hopelessly out of date. The latter problem is now being tackled by the Home Office, and Mr. Mullins tells how magistrates in London tried to remedy the former, though without much success. A system of local agreement on the level of fines is suggested, but the idea is not developed, and Mr. Mullins' experience suggests to him that constant vigilance would be necessary to keep such agreements up to date.

The chapters on imprisonment are full of interest, although rather optimistic and provocative. For example, is it really "a mistake to regard any young offender as too bad for Borstal"? On the credit side, however, can be set Mr. Mullins' clear recognition that courts do sometimes send a person to prison as a punishment. It is a point worth making, too, that until there has been a great extension of other methods of compulsory detention it will not be possible to avoid all short sentences to imprisonment. This is a point which has also been made recently by the Advisory Council on the Treatment of Offenders. The book ends on a modern note by referring to the possibility

that courts may one day be able to make use of prediction or experience tables. These are already being used administratively on an experimental basis by the Prison Commission for deciding allocation to one of the Borstal institutions. But for the present, and, Mr. Mullins believes, for a long time ahead, the courts must do their best with the conventional methods. It is for the practical assistance which it may afford to the courts in this endeavour that this book is to be warmly welcomed.

J. E. Hall Williams.

**The Law of Admiralty. By Grant Gilmore and Charles L. Black, Jr. [Brooklyn: The Foundation Press, Inc.; London: Stevens & Sons, Ltd. 1957. xv and 914 pp. £6 6s.]**

This book on U.S. shipping law combines two qualities that rarely go together. It is a highly instructive textbook and it is refreshing. If its contents reflect what U.S. law students are expected to know the standard of knowledge required by U.S. examiners is considerably higher than in this country. The detail and the mass of case law referred to are worthy of a practitioner's handbook, but the style is far more lively.

British readers, both practitioners and academic lawyers, will derive considerable knowledge from the book and enjoy reading it. Once they have become accustomed to the somewhat different terminology they will find many familiar landmarks—not only English leading cases but even the Marine Insurance Act, 1906, which, in the absence of corresponding U.S. legislation, is widely quoted in U.S. courts. The two laws are, however, by no means uniform; federal constitution and geography, to mention only two factors, have seen to that. As a result of the former, admiralty jurisdiction, reserved to federal courts, covers not only the subjects of British Admiralty jurisdiction but all cases connected with shipping including those which in England are heard in the commercial court. Again, the giant inland waters in the U.S.A. present navigational and other shipping problems none too different from those presented by seafaring, and most shipping laws accordingly apply not only to tidal waters, as in England, but to all important inland waters. In this connection it may be noted that the rule of the division of loss, based on a convention not ratified by the U.S.A., does not apply, but the courts have developed a rule under which trifling negligence of one of the colliding ships can be overlooked.

The place given to marine insurance—the first chapter immediately following a brilliant introduction—seems strange. Admittedly, all branches of shipping law meet in insurance, but didactically the method adopted by the authors surely has the disadvantage of compelling students to grasp almost simultaneously the complex problems of insurance and affreightment. In this book, of course, the lucid presentation, maintained practically throughout, largely removes this difficulty. Characteristic of the manner in which the authors consider business practice is the following sentence in the section on documentary credits: "At a time of sharp market breaks, a bank officer who cannot, at his customer's request, discover some plausible reason for dishonouring drafts, is hardly worthy of the name." Readers over here will also be interested in the account of British Government salvage claims against U.S. ships, and in the different development, for instance, of the law relating to the limitation of the shipowner's liability, although this may soon be out of date should the U.S.A. ratify the Brussels convention of 1957.

It is hoped that these few remarks will stimulate curiosity and induce many lawyers to read this book, which it was impossible to review in greater detail.

O. C. Giles.

## Die Vertretung beim Rechtsgeschäft. By Wolfram Müller-Freienfels. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1955. xxi and 432 pp. DM. 39.60.]

In this book Professor Müller-Freienfels has provided a comprehensive examination of the theoretical basis of the concepts of agency and representation and of the manner in which these concepts are developed in German law and in the institutions of many other legal systems. It is clearly not a book for students; nor could it be described as intended for practitioners since discussion, even where it descends to points of detail and problems of practice, is conducted in terms of abstract theory and philosophy. The book, however, will prove of immense value to those engaged in the task of comparing and of unifying the law of agency and, indeed, the proposals of the Rome Institute and of the Hague Conference on Private International Law have received full and critical consideration from the author.

His aim may be summed up as liberation of the law of agency from domination by those doctrines and general principles which have determined its growth in German law and also, although in varying degrees, in the laws of other Continental countries. Criticism is directed chiefly against the theory which insists that the unilateral grant of authority to an agent must be distinguished sharply from the transactions entered into by an agent in the exercise of his authority. Rigid adherence to this doctrine of separation is blamed for the difficulties experienced in providing solutions which would meet the demands of justice and convenience. These can only be obtained by abandoning dogmatic reasoning and by concentrating instead upon investigation of the interests which the employment of an agent is intended to solve.

It is not surprising that this approach should have led the author to pay special attention to English law and, speaking generally, to commend it, although this is done precisely for those reasons which might incline English lawyers, who have occasion to contemplate the law of agency as a whole and in relation to the rest of the law, to find fault with it. There is, however, little danger that this might cause misunderstandings in the minds of Continental comparative lawyers to whom, of course, this book is primarily addressed, since the account of English rules is distinguished by the same degree of accuracy and indeed of originality displayed in the articles on agency which were contributed by the author to this *Review* some years ago.

J. U.

## Vertragliche Konkurrenzverbote. Ihre Beurteilung nach schweizerischem und englischem Recht, eine rechtsvergleichende Studie. By Dr. iur. Alfred Kuttler (Basler Studien zur Rechtswissenschaft, Heft 44). [Basel: Helbing & Lichtenhahn. 147 pp. Sw.Fr. 12.50.]

This comparative study of the law relating to restraint of trade was presented to the Basle law faculty as a doctorate thesis ten years ago. Though amended before publication it could not consider the most recent British legislation on restrictive trade practices. The description of both the Swiss and English laws is succinct and lucid, and it is enlivened by occasional references to German law. It is interesting for English lawyers to observe how in this particular field Swiss statutes and English common law have come to the same broad conclusion. A precise comparison is of course often difficult since the cases decided by the courts of the two countries are rarely on all fours.

The chief difference between the two laws is the effect of a clause that imposes an excessive restraint on a servant. English courts strike out the clause, while the Swiss judge has the right to cut down the restraint to what

he considers reasonable. In describing this difference the author, not surprisingly, overlooks the general English rule that the court will not make contracts for the parties, so that what the author relates to restraint of trade in reality applies to the whole law of contract.

The reviewer also respectfully differs from the author on another point. When saying that the doctrine of precedents guarantees the certainty of the law through centuries the author rather implies that the precedent safeguard is superior to the statutory system on the Continent. This would seem to go too far. The problem is too wide to be discussed in this brief notice, but two points may be made here. The doctrine of precedents in its full strictness is only some sixty years old. Moreover, chiefly owing to the practice of separate judgments delivered by judges in the appeal courts, it is often extremely uncertain what the law is on a particular point.

O. C. Giles.

**The Constitution and What it Means Today. By Edward S. Corwin. Twelfth revised edition. [Princeton University Press. London: Oxford University Press. 1958. xvi and 344 pp. 48s. net.]**

The appearance of a new edition of *Corwin* is now a fairly regular event, for over a period of thirty-eight years since the publication of the first edition the learned author has kept us up to date with remarkable diligence. A new edition has appeared about every three years, and the popularity of the work is such that thrice has an edition had to be reprinted. The all-round excellence of the volume remains, and no student of the United States Constitution can afford to ignore the author's analytical comments upon the document Article by Article and Amendment by Amendment. As before, Professor Corwin has composed his commentaries from the case law, legislation and constitutional conventions concerned with each subject, including such historical material as may from time to time be necessary and the recent cases and statutes. In one way the nature of this work has to some extent changed in recent years, for it was in the eleventh edition, published in 1954, that Professor Corwin decided to expand the text from the 220 pages of the tenth edition to 285, and to increase the number of cases cited from 700 to 1,000. This trend has been continued in a moderate way in the present edition, which has 309 pages of text and notes, excluding the Table of Cases, etc. Among the most interesting additions to the book are sections on the powers of Congressional committees; recent cases under the Smith Act of 1940 and the General Conspiracy Statute, which are concerned with plots to overthrow the Government by force and violence; and the problems created by disability of the President, and the assumption of power, even if not of the Presidential office, by the Vice-President. The President's power to employ the forces of the United States to discharge the duties of the United States has been questioned by Governor Faubus of Arkansas, but Professor Corwin can find no basis for such objection. Unfortunately the book was already in the press when the most recent developments on desegregation in Arkansas occurred, but the author has included more discussion and material upon the law and events leading up to the now famous decision of the U.S. Supreme Court in 1954. In connection with legislation for the suppression of literature having a potentially deleterious influence upon youth it is good to see quoted Frankfurter J.'s remark: "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."

Nevertheless the alterations and additions to the book are not very extensive in this edition, though there is an increase of two or three hundred cases quoted, mostly in footnotes. Perhaps one adverse criticism might be permitted. The index is of very little use. Although it is only six pages long

many of the entries are merely names of cases, some of which appear to have been placed there instead of in the Table of Cases. The dust-jacket carries the statement that over 1,300 cases are cited in the text, yet the reviewer only counted about 1,150 in the Table of Cases. Some but not all of the others are referred to in the index, and quite a number reside in both. For a book in its twelfth edition this is a strange state of affairs, and, one would have thought, a quite unnecessary one.

D. C. M. Yardley.

## In Defence of Colonies: British Colonial Territories in International Affairs. By Sir Alan Burns, G.C.M.G. [London: George Allen & Unwin, Ltd. 1957. 338 pp. 25s. net.]

There has been so much ill-informed criticism in recent years of British "Colonialism," not only from overseas but also in this country, that an apologia of this kind needed to be written. Sir Alan Burns, who had a long career in the Colonial Service culminating in the Governorship of the Gold Coast, knows what he is talking about far better than most of the critics. His reasoned arguments are supported largely by references to non-British and even anti-British sources. The chapter on how the remaining Dependencies were acquired will come as a surprise to many readers. Commerce, missions and the suppression of the slave trade are revealed as predominant motives, and only one or two acquisitions involved fighting by the British against indigenous peoples. The achievements of British administration—law and order, public health, educational and economic development in preparation for self-government, the earlier "open door" to the trade of all nations, and financial assistance—are shown against the background difficulties of tropical climate and mixed racial populations. The demand for independence is prompted more by "national" pride than by material considerations, even where the "nation" had no existence until it was created by the British. The movement towards self-government Sir Alan considers inevitable, but too hurried. It is by no means certain that "democratic" ideas which evolved in this country over a period of centuries, such as universal adult suffrage (1928) and the secret ballot (1872), are necessarily suitable for all these territories in the present stage of their development. On the other hand some of these developments, such as education and public health, might have been introduced earlier, as Sir Alan admits.

A former Representative of the United Kingdom on the Trusteeship Council of the United Nations, Sir Alan takes a poor view of that Council, regarding its work as vitiated by prejudice and distortion of British policy. In discussing the attitude of particular countries, Sir Alan makes clever, though by no means exclusive, use of the *tu quoque* argument. Russian imperialism and the new kinds of American "colonialism" are adroitly pilloried.

Specific claims by other countries to certain British Dependencies are examined historically in Part II, notably Cyprus, Aden and the South African High Commission Territories. The point is made that (except in Cyprus) no sizable minority in any of the territories claimed wishes to transfer allegiance to another sovereign. The British policy with regard to Cyprus is admitted to be primarily strategic. "We went there in 1878," says Sir Alan at p. 292, "with the consent of the Turks in whose possession the island then was, in order to assist Turkey in defending itself against the Russians. Our present reasons for staying there are very similar." If it be argued that Britain or NATO could by agreement establish bases in a Greek Cyprus, we are reminded of what has happened to the Suez Canal Base, and (within the Commonwealth) to Simonstown and Trincomalee, and (within NATO) to Iceland's agreement with the United States.

Is this a one-sided book? Perhaps, but after all it is written in *defence* of Colonies. Let those who remain sceptical read it carefully and answer the arguments if they can.

O. Hood Phillips.

**The Assize and Quarter Sessions Handbook.** By Cyril E. S. Horsford. [London: Sweet & Maxwell, Ltd. 1958. ix and 136 pp. (with index). 17s. 6d.]

This is really a new edition of the book by the late Linton Thorp K.C. and R. E. Negus (see 10 M.L.R. 454). The new editor, who, as Senior Assistant, County of London Sessions, is well qualified for his task, has filled in some of the rather noticeable gaps to which I drew attention in my review of the previous edition, notably in connection with punishment which from some points of view is the most important and difficult work undertaken by courts of assize and quarter sessions. It is particularly helpful to have references to some of the guidance which has been issued of recent years by the Court of Criminal Appeal and the Queen's Bench Divisional Courts and this aspect might be expanded with advantage.

Two statutes of great importance in relation to this subject have been passed since the second edition of this book appeared; these are the Criminal Justice Act, 1948, and the Magistrates Act, 1949. The incorporation of the changes effected by the former have in particular required a great deal of editorial work which appears to me to have been ably carried through. Some other more recent statutes such as the Magistrates' Courts Act, 1952, are also referred to.

All the above additions have been made without increasing the size of the handbook appreciably, an important point. On the other hand there are still inexcusable gaps. Thus bastardy appeals, which form a substantial part of the work of all quarter sessions courts, are not dealt with, while some of the longer items, *e.g.*, corroboration, are presented in such an unsystematic way as to lose much of their value. Again the entries are occasionally rather irritating. Thus, on the subject of the competency of a "consort" (why not spouse?) to give evidence against the wishes of the accused it is not very helpful to be told that there is competency under the Sexual Offences Act, 1956, except under ss. 12, 15 and 16 without any indication of what these three sections are concerned with.

One of the most difficult problems with which a judge handling a criminal trial is likely to be concerned is that of advising a jury who are finding that they cannot reach agreement upon their verdict, upon which matter there has been useful guidance by the Court of Criminal Appeal. It would be helpful to have an addition to the material given under Verdict to cover this point.

C.

**Scripta Hierosolymitana.** Volume V. Studies in Law. Edited on behalf of the Faculty of Law by Benjamin Akzin. [Jerusalem: Magnes Press. 259 pp.]

The fifth volume of the scholarly studies published by the Hebrew University Press in English, with the title *Scripta Hierosolymitana*, contains nine learned papers by members of the Law Faculty, which is nine years old. Eight are in English: the ninth, written by a woman teacher of the Faculty who gained her doctorate at the Sorbonne University of Paris, is in French. They are edited by Professor Akzin, the Dean of the Faculty. These essays do not

represent a systematic exposition of a single field, but deal with different aspects of Israeli and Comparative Law and legal history. The international composition of the Faculty is reflected in the contrasting approach of the writers. Professor Tedeschi from Italy, dealing with Private Law and Legislation, has the strict theory and adhesion to principle of the Roman lawyer. Professor Nathan Feinberg, originally from Lithuania, dealing with the Minorities Treaties, shows the close reasoning of the Rabbinical schools. Dr. Lapidoth, the woman contributor, writing on International Law, has the logical thoroughness of the French school. Judge Baker, a former Law-officer of the British Mandatory Administration, has the pragmatic Anglo-Saxon standpoint. Dr. Warhaftig, from Poland, and former Under-Secretary in the Ministry of Religions, is a master of Talmud, and shows that the Anglo-Saxon doctrine of specific performance of contracts has parallels in Hebrew law, which can be applied in Israel.

All the different strands will be woven together in the new fabric of the law of Israel. The British contribution to that law is at present dominant, because the greater part of the statutory legislation, which Israel took over in 1948, was based on English models, and the general principles of the English common law and equity are still the residuary source of judicial decision. An American note is being introduced into the more important law-making of the State, because of the Harvard Department of comparative jurists who are engaged in the preparation of new fundamental laws for Israel. But none of their projects has yet been enacted.

One of the essays deals with recent developments of the Doctrine of Precedent in Israel. In the courts of the Mandate Administration the rule of English common law prevailed, that the judge was bound by a decision of the higher court on the same point whether in Palestine or in England, and the Supreme Court was bound by its own decisions, even if the judges might wish to overrule the former judgment. The principle *stare decisis* was a fundamental part of the English rule of law. In Israeli courts, however, doubts began to be expressed about the soundness of the rule in its English form. Judges trained in the German or continental systems have less respect for precedent and more for considerations of broad justice. The uncertainty was mischievous; and in 1957 the Judicial Courts Law enacted by the Knesset prescribed a straight rule:

(a) A court is to be guided by rules of law decided by a higher court.
(b) A rule of law decided by the Supreme Court binds all courts with the exception of the Supreme Court itself.

The Legal Committee of the Knesset had proposed that the Supreme Court could only overrule a previous decision when five or more judges were sitting. But an amendment to drop that limitation was carried, and allows the court in its normal composition of three members to depart from precedent. The opponents of the English rule claimed that it was not democratic, and further that it was not in accord with the division of powers. Judges should deal with the case before them, but should not be entitled to create general legal norms because judge-made law does not express the social will.

Judge Baker, in an essay on the use of Marginal Notes in the interpretation of statutes, points to another aspect of the trend to get away from English tradition when it does not seem to accord with existing needs of Israel. The English courts have made a distinction between marginal notes which form part of the Act of Parliament when passed, and notes put in by an editor of the legislation. In the former case the courts can have regard to the note interpreting the article. A judge of the Israeli Supreme Court held that the courts in any case should accept inspiration for interpreting the law from the marginal notes, provided they are not inconsistent with the express provisions.

In the papers on Public and Private International Law Professor Feinberg examines minutely the question whether the Minorities Treaties adopted at the end of World War I for assuring civil and cultural rights to members of religious and racial minorities are still valid, or are abrogated in view of the changed circumstances. That was a subject of special study by the United Nations Secretariat, but no definite action was taken by an authoritative body. On the other hand, both at the San Francisco Conference, 1945, which drew up the Charter of the U.N., and at the Paris Conference, 1946, which prepared treaties with the Satellite States of the Nazis, Roumania, Hungary, Bulgaria, it was assumed that the system of protection of minorities should be replaced by a system of international promotion and assurance of Human Rights. The Universal Declaration of Human Rights contemplates provision for the cultural rights of any section of the nation that has its own language or religion. The memorandum drawn up by the Jewish bodies represented at Paris gave no indication that the Satellite States were bound by their obligation to Jews and other minorities assumed after the first war. Professor Feinberg concludes that those obligations had lapsed by desuetude. Dr. Lapidoth's study of the relation of the International Common Law to the internal law of Israel is a well-documented examination of the attitude taken by the courts of Israel towards general rules and doctrines of the law of nations. Broadly they follow the English principle that such rules are incorporated in the law of the country, but if there is doubt about the general acceptance of an established rule, *e.g.*, in regard to the Succession of States, the court is not bound. An exception has to be made in connection with the religious courts of Israel. They do not have regard to any rule of international law, public or private, but treat the religious law as applicable absolutely.

N. Bentwich.

**Brighouse on Wills. By Edward F. George and James H. George. Seventh edition. (London: Sweet & Maxwell, Ltd. 1958. xv, 133 and (index) 4 pp. 21s.]**

It is now seven years since the last edition of this short book of Will forms. In the present edition the general scope of the book remains the same, but the precedents have been amended and added to with a view to changed conditions and changed attitudes rather than to any changes in the law. There are substantial alterations in the precedents which are aimed at reducing Revenue liabilities. Notably there are precedents giving legacies upon condition of the legatee entering into a covenant to pay annuities to other members of the family, in other cases there is a much wider use of discretionary trusts, and there are incidental amendments to "power" and "investment" clauses. The whole is a carefully revised and up-to-date work. Clearly, though, the revisions need thought before they are adopted. Any draftsman of wills is faced by a range of desirable ends and has to choose. Some of the new precedents, while undoubtedly they will save in tax, may lose both in safety and in family well-being. Ten years after a death the feeling of the remainderman with a share, albeit a diminished one, of an estate in prospect may be happier than those of the legatee whose recollection of the gift has been dimmed, but whose constant feeling is of payments under the covenant. In some families the older precedents may still be preferable though the new are useful. Perhaps, too, some of the investment clauses should be looked at with care. Public Stocks of the Dominions are included with certain specific exceptions. These exceptions may not remain appropriate. There may conceivably be like difficulties in including the stocks of new Dominions other than the excepted ones, and the reasons for the present exception, whatever they may be, may

go. Clearly, however, to furnish a precedent is not to excuse the draftsman from thought, and the editors for their part have done their job thoroughly.

J. D. B. Mitchell.

Wurtzburg's Building Society Law. Eleventh Edition. By John Mills, o.b.e., b.a., of the Middle Temple and Lincoln's Inn, Barrister-at-Law, assisted by Bryan J. H. Clauson, m.a., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1958. 467 pp. £2 10s.]

This is a handbook on the law relating to building societies which, in addition to a treatise on the law, gives the relevant statutes and a collection of forms and precedents. It is thus primarily intended for legal practitioners and building society officials. The reader who seeks a clear and simple statement of the legal situation can be recommended to use this book. On the other hand, it is not an exhaustive account of the English law of mortgages, and in the event of a building society mortgage giving rise to a difficult point of law, the reader is perhaps more likely to find the answer in the established text-books on mortgages than here. This is stated not by way of criticism—for indeed there is little to criticise—but in order to indicate the nature of the book. In the overwhelming majority of cases the practitioner goes to a book on building society law, not for the general law on mortgages, but for some particular rule concerned with building society mortgages, and for this purpose the new edition of Wurtzburg is admirable.

The last edition was brought out in 1952. In the meantime there has been an interesting development in the English law applicable to mortgages, represented by the cases dealing with deserted wives and unwanted sub-tenants: the cases are adequately dealt with in the new edition, and clear guidance given as to the present state of the law. This is indeed typical of the care with which the book has been brought up to date. At fifty shillings it represents sound value for money.

D. C. Potter.

Bang to Rights. An Account of Prison Life. By Frank Norman, with a Foreword by Raymond Chandler. [London: Secker & Warburg. 1958. 192 pp. 15s. net.]

Books by ex-prisoners are the vogue nowadays. They are of various sorts: either intended to throw doubt on our present criminal law, our penal methods and their effectiveness; or to air grievances—many alas justified—about prison life as it now is; or frankly to arouse pity for the author. All three aims have something to commend them.

Frank Norman pursues the whole lot, but what makes his book different is that he utterly fails to convince on any of these points. "There is no damned literary nonsense about his writing," says Mr. Chandler accurately in his foreword, yet the utter abandonment of all rules of grammar, orthography and punctuation and the dull prison slang repeated *ad nauseam* end up by striking one not as natural, direct and spontaneous (as no doubt they are meant to do), but as devised. The only thing the author does produce convincingly is a sort of portrait of himself, and it is an extremely unpleasant one: callous, revengeful and obdurate. Or perhaps even that is a pose: the pose of the tough who must not lose face.

Yet, when one comes to think of it, it may be that this is what is almost bound to become of a man who has been five times in prison before the age of thirty (or twenty-seven to be exact). And if that is the lesson of *Bang to Rights*, it was not a wholly vain effort.

H. A. H.

CASEBOOK OF THE CURIOUS AND TRUE. By FRANCIS X. BUSCH. [London: Arco Publications, Ltd. 1958. 228 pp. 30s. net.]

THIS new volume is, to this reviewer at least, far more agreeable and acceptable than the same author's previous collection of "Notable American Trials" which was discussed in (1958) 21 M.L.R. 460–461. The reason is not far to seek. Whereas the earlier volumes contained somewhat over-simplified and over-dramatised accounts of trials which possessed, almost without exception, considerable historical and political significance, the *Casebook of the Curious and True* is made up of eight stories from the by-ways of the law which are plainly chosen only with an eye (and a good eye at that) for the picturesque, not to say the romantic. Here the editor's relish for excitement and suspense finds a legitimate outlet and immediacy is gained from the fact that, with most of the cases here retold, he was personally connected in a professional capacity. The entertainment value of these yarns ranks high among the true adventure stories from the court-room.

H. A. H.

*Books and Publications Received*

ENCYCLOPAEDIA OF PLANNING, COMPULSORY PURCHASE AND COMPENSATION. Vol. I, Revision 31, May 19, 1958; Revision 32, August 1, 1958; Revision 33, November 21, 1958. Vol. II, Revision 31, May 19, 1958; Revision 33, November 21, 1958.

LOCAL AUTHORITIES' POWERS OF PURCHASE. A summary by A. S. WISDOM. [Chichester, Sussex: Justice of the Peace, Ltd., Little London. 1958. 5s.]

REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS. Supplement No. 1. Vol. II, Articles 55–111 of the Charter. [New York. 1958. vi and 457 pp. 32s.]

MEMORANDA OF EVIDENCE SUBMITTED TO THE SELECT COMMITTEE OF THE HOUSE OF COMMONS ON OBSCENE PUBLICATIONS by the Progressive League, Alec Craig, The Society of Labour Lawyers. [The Progressive League, 20 Buckingham Street, W.C.1. 1958. 12 pp. 2s.]

CURRENT LAW GUIDE NO. 14. LANDLORD AND TENANT (TEMPORARY PROVISIONS) ACT, 1958. By ASHLEY BRAMALL. Scottish Section by IAN C. KIRKWOOD. [Current Law Publishers, Ltd. 1958. xi and 120 pp. 9s. 6d.]

LAWS OF THE STATE OF ISRAEL. Vol. 10, 5716–1955/56. Authorised Translation from the Hebrew, prepared at the Ministry of Justice. [Published by the Government Printer. 129 pp.]

AN INDEX TO THE AUSTRALIAN LAW JOURNAL, Vols. 1–30 (1927–1957). Compiled by R. ELSE MITCHELL, Q.C., and P. H. LANE. [The Law Book Co. of Australasia Pty Ltd. iii and 235 pp.]

THE MIDDLE EAST IN TRANSITION. STUDIES IN CONTEMPORARY HISTORY. Edited by WALTER Z. LAQUEUR. [Routledge & Kegan Paul, London. 1958. xix and 513 pp. 40s.]

NOTES ON DISTRICT REGISTRY PRACTICE AND PROCEDURE. By THOMAS S. HUMPHREYS. Eleventh edition. [London: The Solicitors' Law Stationery Society, Ltd. 1958. v and 106 pp. 15s.]